No. 77-402

In the Supreme Court of the United States

October Term, 1977

Jacob C. Ferguson, Petitioner,

vs.

The Board of Trustees of Bonner County School District No. 82, a Municipal Corporation of the State of Idaho, and Vernon Ruen, Dr. William H. Morton, Jr., Venus Verhei, Marian Ebbett, and Dr. David Beeson, constituting the members of said Board, Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Idaho

James E. Hunt
GREENE & HUNT
Peter B. Wilson
WILSON & WALTER
Box 749
Bonners Ferry, Idaho 83805
Counsel for Petitioner

E. L. Miller
MILLER & KNUDSON
Coeur d'Alene, Idaho 83814

Glenn E. Bandelin
Jon Hammarberg
P. O. Box 216
Sandpoint, Idaho 83864
Counsel of record for Respondents.

September 1, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

JACOB C. FERGUSON, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Idaho entered in the above entitled case on April 28, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho was entered April 28, 1977, and is reported at 564 P.2d 971, and is printed in Appendix A hereto, infra, page 22.

The Order Granting Respondent's Summary Judgment was entered April 7, 1975, by the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, and is printed in Appendix A, hereto, infra, p. 44. Summary Judgment was entered April 21, 1975, by said District Court, and is printed in Appendix A, hereto, infra, p. 38.

The opinion of said District Court was entered April 21, 1975, and is printed in Appendix A, hereto, infra, p. 44.

The Order Denying Appellant's Petition for Rehearing was entered June 20, 1977, and is printed in Appendix A hereto, infra, p. 20.

JURISDICTION

The Judgment Opinion of the Supreme Court of the State of Idaho (Appendix A, infra, p. 22) was entered on April 28, 1977. A timely petition for rehearing was denied June 20, 1977 (Appendix A, infra, p. 20. The opinion of the trial court's Order Granting Summary Judgment was entered on April 7, 1975. The jurisdiction of the Court is invoked under Rule 19.1(a) of the Revised Rules of the Supreme Court of the United States; 28 U.S.C.S., Sec. 1257. (3); Article 3, Section 2, Paragraph 1 of the Constitution of the United States; and Amendment 14, Section 1 to the Constitution of the United States.

The respondent, an arm of the State of Idaho, denied appellant a hearing before depriving petitioner of his property right acquired from consecutive years as a teacher for respondent School District.

QUESTIONS PRESENTED

1. Is due process notice given when:

a) The form used is so defective the Idaho Supreme Court agrees it " . . . suggest(s) that the decision regarding his discharge had already been made." (Appendix A, infra, p. 31).

b) The form used is so defective the Idaho Supreme Court agrees it " . . . suggested the burden was on Ferguson to show 'reasons why said discharge should not be effected.' " (Appendix A, infra, 32).

2. Is a constitutional hearing held in light of the following:

a) No evidence is submitted at the hearing.

b) The only evidence ever given respondents to support discharge was hearsay evidence given at a secret executive session.

c) No facts are available to show prima facie cause for discharge has been established. (Ferguson v. Board of Trustees, Appendix infra, p. 29, footnote 2).

d) Board members minds must be changed, not just convinced.

3. Does a teacher waive his right to hearing by:

a) Calling for a hearing.

b) Attending the hearing.

c) Advising respondents he had only several questions to ask.

d) Advising respondents he was leaving because the respondents had already made up their collective minds to discharge him.

e) Advising respondents that he was leaving the hearing, but that he wanted the hearing to proceed.

4. Were the procedures followed by respondents adequate to satisfy the constitutional test that is required to be met for determining the sufficiency of notice and hearing?

5. Did the Idaho Supreme Court properly find "waiver" of a constitutional right when it was not clear that there was such a waiver?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment 14, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Idaho Code 33-513(4):

> "To suspend, grant leave of absence, place on probation or discharge certificated professional personnel for

> continued violation of any lawful rules or regulations of the board of trustees or of the state board of education, or for any conduct which would constitute grounds for revocation of a teaching certificate. No certificated professional employee shall be discharged during a contract term except under procedures prescribed by the state board of education."

3. Idaho Code 33-1208:

> "The state board of education may revoke any certificate issued or authorized under section 33-1201 upon any of the following grounds:
>
> a. Gross neglect of duty;
> b. Incompetency to instruct or govern a class or school;
> c. Breach of the teaching contract.
> d. Making any material statement of fact in the application for a certificate, which the applicant knows to be false;
> e. Revocation, refusal or denial of a certificate in another state for any reason constituting grounds for revocation in this state;
> f. Conviction in this state or any other state of a crime involving moral turpitude;

g. Any disqualification which would have been sufficient grounds for refusing to issue or authorize a certificate, if the disqualification existed or had been known at the time of its issuance or authorization."

4. Idaho Code 33-1212:

"Commencing with the third consecutive year of employment by the same school district, and until the age of seventy (70) years is attained, each certificated employee named in subsection 2 of section 33-1001 and each school nurse and school librarian shall be entitled to and be employed on a renewable contract.

Except as otherwise provided, each such certificated employee, school nurse, or school librarian shall have the right to automatic renewal of contract by giving notice, in writing, of acceptance of renewal. Such notice shall be given to the board of trustees of the school district then employing such person not later than the first day of April preceding the expiration of the term of the current contract. Except as otherwise provided by this paragraph, the board of trustees shall notify each person entitled to be employed on a renewable contract of the requirement that such person must give the notice hereinabove and that failure so to do may be interpreted by the board as a declination of the right to automatic renewal or the offer of another contract. Such notification shall be made, in writing, not later than the 10th day of March, in each year, except to those persons to whom the board, prior to said date, has sent proposed contracts for the next ensuing year, or to whom the board has given the notice required by section 33-1213.

Any contract automatically renewed under the provisions of this section shall be for the same length of the term stated in the current contract and at a salary no lower than that specified therein, to which shall be added such increments as may be determined by the statutory or regulatory rights of such employee by reason of training, or service, or both.

Nothing herein shall prevent the board of trustees from offering a renewed contract increasing the salary of any certificated person, from re-assigning administrative or supervisory employees to classroom teaching duties with appropriate reduction of salaries from pre-existing contracts."

STATEMENT

Petitioner was a teacher hired by respondents. The school district provided the education for Idaho children as required by Idaho law (Idaho Constitution, Article IX, Section 1. Appendix A, infra p. 81). Petitioner had a property interest of which he could not be deprived without notice and hearing (Ferguson v. Board of Trustees, Appendix A, infra, p. 30).

In March, 1973, respondents submitted a new contract to petitioner. Before petitioner signed the new contract, and on May 15, 1973, respondents passed a "Resolution for Discharge of Teacher" (which is quoted verbatim in the Idaho Supreme Court opinion, Appendix A, infra, p. 23). The Resolution contained a statement that petitioner could request a hearing " . . . for the purpose of showing reasons why said discharge should not be effected." The action by respondents contemplated compliance with Idaho Code Sections 33-513(4); 33-1208; and 33-1212.

Petitioner timely requested a hearing. The hearing was scheduled for June 26, 1973, and all parties assembled at that time.

Petitioner advised respondents that he only had a couple of questions to ask of board members. He advised the respondents that he did not wish to in-

terrogate witnesses, but that he did expect respondents to proceed with his hearing. At all times, respondents advised petitioner that petitioner had the duty to show cause why he should not be fired. At no time did respondents present petitioner with evidence to support the resolution.

Petitioner advised the board that he and the two local newspapers interpreted as a complete discharge the action of respondents in adopting the "Resolution for Discharge of Teacher." (Appendix A, infra, p. 68 and 71). At least one of respondents agreed that petitioner had correctly interpreted the newspapers' conclusion.

During the part of the hearing attended by petitioner, of the three board members speaking, at least two of them acknowledged they had formed an opinion based upon undisclosed evidence given in an executive session. The other two expressed no opinion whatsoever.

The attorney for respondent School Board agreed that the board would go ahead with petitioner's hearing after petitioner asked his question of the Board.

After gaining the admission of one respondent that he had actually made up his mind upon secret meeting evidence, petitioner stated it was useless for him, petitioner, to try and change such a conclusion of that respondent.

Having asked his question, petitioner left his hearing; but respondents broke their promise and did not continue with the hearing. Instead, after brief discussion, they discharged petitioner without bothering to take any evidence whatsoever.

(The foregoing fact summary is substantiated by excerpts from the hearing which are included in Appendix A, infra, p. 57).

Thus, except for respondents, all who examined the "Resolution for Discharge of Teacher" were convinced petitioner was fired by that resolution. Petitioner came to the hearing with that conclusion. At the hearing, while assuring petitioner that the resolution did not constitute a discharge, two of the three spokesmen for the Board admitted they did not have open minds, and that petitioner would have to change the existing conclusion each had.

Petitioner, therefore, was without any record to present to an appellate court; and for him to have stayed at the hearing would have been a futile act since the board had a preconceived conclusion.

Petitioner then petitioned in mandamus, Respondents moved for Summary Judgment. In granting Summary Judgment, the Court stated:

"Although Ferguson requested the hearing, he continually refused to participate in

the hearing, stated that he did not desire to hear any of the witnesses that the Board attorney was going to call, and left the hearing room before any witnesses were presented.

"By Ferguson's actions the entire procedure prescribed by the State Board of Education to discharge a teacher took on an unusual atmosphere.

"If Ferguson had never requested a hearing, the matter would have terminated with the passage of the 'Resolution for Discharge of Teacher' on May 15.

Ferguson was entitled to a meaningful hearing where he could hear the evidence the Board had previously considered and present evidence on his own. However, it would be a useless act for the Board to again take and receive the same information after Ferguson had refused to participate and had departed.

"The Supreme Court of the United States has announced many times that the central meaning of procedural due process is that a person whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner by proper

notice given. However, the hearing required is subject to waiver.

"In this case a teacher can waive his right to a hearing by not requesting one (Tucker vs. San Francisco Unified School District (Cal) 245 P2d 597).

"Likewise, a teacher can waive his right to a hearing by requesting one but subsequently refusing to participate. What the Constitution does require is "an opportunity" for a hearing. Ferguson was granted such an opportunity. The Board and its attorney were more than accommodating in advising Ferguson of his right to counsel, to a continuance, his right to examine witnesses, and present witnesses in his own behalf. Ferguson with full and complete knowledge, waived this opportunity to participate in the hearing which he had called, and the District has complied with all of the requirements set forth by the State Board of Education (See Boddie vs. Connecticut, 91 S.Ct. 780 at page 786; and cases cited in Fuentes vs. Shevin 92 S.Ct. 1983, at page 1994, as to the meaning of hearing under due process clause.)

"After Ferguson declined to proceed with the hearing, the Board acted properly in

passing the final motion to dissolve Ferguson's employment on the 'known facts and circumstances' it previously had before it from Dr. Likens."

(Appendix A, p. 54).

The Supreme Court of Idaho then affirmed the action of the trial court and outlined the issues as follows:

"This case involves questions concerning the statutory and constitutional adequacy of the notice and hearing afforded a teacher who was discharged for cause by the board of trustees of a school district. It is complicated by the fact that the teacher walked out of the hearing as it commenced."
(564 P.2d, p. 973) (Appendix A, p. 23).

REASONS GRANTING THIS WRIT

The Supreme Court of Idaho has decided this case in a way probably not in accord with applicable decisions of this Court.

I.

NO NOTICE OF HEARING

The Idaho Court acknowledged that Fuentes v. Shevin, 407 U.S. 67, 92 S.CT. 1983, 32 L.Ed 2d 556 (1971) interpreted procedural due process as requiring that "notice of charges be given." At the same time the Idaho Supreme Court agreed with petitioner

that the "Resolution for Discharge of Teacher" adopted unanimously by respondents was couched in discharge language (p. 976), and that this took away a property right. But the Idaho court then said (p. 976), "However, we do not agree that this necessarily constitutes a violation of due process." Yet, Fuentes clearly states (407 U.S. @ 82), "But no later hearing . . . can undo the fact that the abitrary taking that was subject to the right of procedural due process has already occurred."

The "Resolution for Discharge of Teacher" did not notify petitioner of charges and a right to a hearing. Instead, that resolution discharged petitioner and then advised him he had a right to carry the burden and convince the Board to change the decision. Thus, petitioner attended the "hearing" legitmately believing he had been fired and that the discharge was based upon unknown facts given at a secret meeting.

II.

NO EVIDENTIARY HEARING

After holding that the "Resolution for Discharge of Teacher" gave petitioner due process notice of the charges against him, and of his right to a hearing, the Idaho Supreme Court then discussed the validity of the subsequent "hearing" called by

petitioner for June, 1973. The Idaho court accepted the principles of Goldberg vs. Kelly, 397 U.S. 254, 90 C.Ct. 1011, 25 L.Ed 2d 287 (1970). That case held that the hearing must be evidentiary and must included certain elements (as summarized in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed 2d 18 (1976) @ p. 27, footnote 4.):

> " . . . (1) 'timely and adequate notice detailing the reasons for a proposed termination'; (2) 'an effective opportunity (for the recipient)) to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally'; (3) retained counsel, if desired; (4) an 'impartial' decisionmaker. (5) a decision resting 'solely on the legal rules and evidence adduced at the hearing'; (6) a statement of reasons for the decision and the evidence relied on."

The Idaho court felt all the criteria had been met in spite of the fact that:

1. The decisionmakers were in fact biased (supra p. 68);
2. The decision was not based on evidence adduced at the hearing (supra, p. 29); and,
3. No statement of reasons for the decision given, and no statement was given of the evidence relied on. (Ferguson v Board of Trustees, Appendix A, infra. p. 29).

III.

NO WAIVER

Petitioner left the "hearing" after stating, "I mentioned to you outside that I requested the hearing and I mentioned to these gentlemen that I really don't care to hear any testimony and I care not to question anyone. So if it is all right with you, I will go ahead with my question and then you can go ahead with your hearing or with my hearing." (Appendix A, infra, p. 61). The Idaho Supreme Court did not interpret this as saying anything to the effect that he expected the Board to proceed to hear the evidence after he left. (Ferguson v. Board of Trustees, Appendix A, infra, p. 36). At this same time petitioner stated to the Board, shortly before leaving, that he would not be able to convince the board of anything because the board had already made up its mind. (Appendix A, infra, p. 69). The Idaho Supreme Court did not consider this to be an explanation for leaving the "hearing". (Ferguson vs. Board of Trustees, Appendix A, infra, p. 36).

These determinations of the Idaho Supreme Court are in direct conflict with the following statement in the Fuentes case (p. 579):

> "For a waiver of constitutional rights in any context must, at the very least, be clear."

This statement is based upon the quotation from Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 81 L.Ed 1177, 1180, 57 S.Ct. 809, recited in footnote 31 of Fuentes @ p. 578):

> Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver."

CONCLUSION

Having been discharged without notice and hearing, petitioner was deprived of any meaningful record with which to present to a court for legal interpretation. That is to say, petitioner could have waived any objection to evidence submitted by respondents, and still prevailed upon a court interpretation of the effect of such evidence. It would have been an useless act to proceed to interrogate and cross-examine witnesses and submit evidence when:

1) Petitioner was discharged at a secret hearing.
2) Respondents had already made up their minds as to a decision; and
3) Petitioner was willing to accept the evidence to be submitted by respondents as the facts of the case, and expect to prevail with such facts before a court of law.

Thus, this petition for a writ of certiorari should be granted.

Respectfully submitted,
GREENE & HUNT

James E. Hunt
Counsel for Petitioner
320 North 2nd
Sandpoint, Idaho 83864

WILSON & WALTER

Peter B. Wilson
Counsel for Petitioner
Box 749
Bonners Ferry, Idaho 83805

E. L. Miller
MILLER & KNUDSON
P. O. Box E
Coeur d'Alene, Idaho

Glenn E. Bandelin
P. O. Box 216
Sandpoint, Idaho 83864

Jon Hammarberg
P. O. Box 216
Sandpoint, Idaho 83864
Counsel of Record for Respondents.

September 1, 1977

APPENDIX "A"

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SUPREME COURT — STATE OF IDAHO

Boise, Idaho

James E. Hunt
Greene & Hunt
Attorneys at Law
Sandpoint

Peter B. Wilson
Attorneys at Law
Bonners Ferry

Glenn E. Bandelin
Attorneys at Law
Sandpoint

E. L. Miller
Attorney at Law
Coeur d'Alene

Jon Hammarberg
Attorney at Law
Sandpoint

SUPREME COURT No. 11967

June 20, 1977

JACOB C. FERGUSON,
Appellant,

vs.

BOARD OF TRUSTEES OF BONNER COUNTY SCHOOL DISTRICT NO. 82, a municipal corporation of the State of Idaho, and VERNON RUEN, DR., WILLIAM H. MORTON, JR., VENUS VERHEI, MARIAN EBBETT, and DR. DAVID BEESON, constituting the Members of the said Board,
Respondents.

GENTLEMEN:

In the above entitled cause the Court has today denied Appellant's Petition for Rehearing.

R. H. YOUNG,
CLERK OF THE SUPREME COURT
STATE OF IDAHO

In the Supreme Court of the State of Idaho

No. 11967

JACOB C. FERGUSON, Petitioner-appellant, Petitioner, v. THE BOARD OF TRUSTEES OF BONNER COUNTY SCHOOL DISTRICT NO. 82, a municipal corporation of the State of Idaho, and VERNON RUEN, DR. WILLIAM H. MORTON, JR., VENUS VERHEI MARIAN EBBETT, and DR. DAVID BEESON, constituting the members of the said Board. Respondents.	Coeur d'Alene Term, October 1976 Filed: Apr. 28, 1977 R. H. Young, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, Bonner County. Hon. Dar Cogswell, District Judge.

Appeal from an order denying alternative writ of mandamus to teacher seeking to compel school board to reinstate him. Affirmed.

Peter B. Wilson of Wilson & Walter, Bonners Ferry, Idaho; and James E. Hunt of Greene & Hunt, Sandpoint, Idaho, for appellant.

Jon Hammarberg and Lucinda Weiss, of Bandelin & Weiss, Sandpoint, Idaho; and E. L. Miller of Miller & Knudsen, Coeur d'-Alene, Idaho for respondents.

BAKES, J.

This case involves questions concerning the statutory and constitutional adequacy of the notice and hearing afforded a teacher who was discharged for cause by the board of trustees of a school district. It is complicated by the fact that the teacher walked out of the hearing as it commenced.

On May 15, 1973, the school district administrator appeared at a regular meeting of the board of trustees of the Bonner County School District and recommended to the board that Jacob Ferguson, a teacher in the Bonner County schools, be discharged for improper grading practices and insubordination. Based on the showing of grounds for discharge put forth by the administrator, the board unanimously resolved to issue the following "Resolution For Discharge of Teacher" which was served upon Ferguson:

> "It is Resolved by:
> "The Board of Trustees of Bonner County School District No. 82 of Bonner County, Idaho, being fully advised in the premises, and being of the opinion that Jake Ferguson, a teacher in said district, should be discharged for the following reasons:
> "Applying a grading system for an improper purpose and which does not relate to the level of difficulty of work to such an extent as to constitute gross neglect of duty in failing to report progress of students to parents

accurately, and that said acts constitute insubordination in that the teacher has previously been instructed to correct this deficiency and neglected to do so.

"A hearing may be requested by Jake Ferguson within 30 days after receipt of a copy of this resolution for the purpose of showing reasons why said discharge should not be effected.

"Said hearing must be held within 15 days after the request is received. At said hearing, the teacher may be represented by counsel and may present evidence on his own behalf and examine any person who may have spoken against him.

"It was moved, seconded and carried that the above resolution be adopted."

The text of this resolution follows the format recommended by the State Board of Education in its regulations prescribing procedures for the discharge of teachers.

Regular school board meetings are open and the minutes of proceedings made public, but for personnel matters such as the discharge of a teacher the Bonner County board of trustees retired to executive session during which no minutes were taken. Consequently, there is no record of the information placed before the board of trustees by the school administrator concerning the grounds for Ferguson's discharge.

Jacob Ferguson timely requested a hearing which was held on June 26, 1973. Present at this hearing

were Ferguson, appearing without counsel), the attorney for the school district, the school administrator and other school officials, several students and parents who were to appear as witnesses against Ferguson, and the five trustees. The attorney for the school district stated initially that the resolution was merely an accusation and not a final determination of cause for discharge by the Board. Ferguson made it clear from the outset that he did not care to hear any testimony and that he would not present any witnesses, because he believed the board had already made up its mind. He stated that the resolution sounded conclusive to him and that he had assumed that the board had already heard all the evidence against him. It was again stated by a trustee that the board had not yet made a final decision — that that was the purpose of the hearing. The board members and school attorney asked Ferguson if he would like a continuance and urged him to consult an attorney. However, Ferguson walked out of the hearing before the school district presented any evidence relating to the cause of discharge. After he left, the board members debated whether they should proceed with the hearing but concluded that they should not put on any evidence against Ferguson since he was not present. The board then unanimously voted to discharge him.

Ferguson subsequently petitioned the district court for an alternative writ of mandamus, seeking to compel the school trustees to reinstate him as a teacher in the Bonner County schools. In a memorandum opinion, the district court concluded that the school board had substantially complied with I. C.

§ 33-513 (4)[1] and the procedures adopted by the State Board of Education, and also that the board of trustees would have proceeded with the hearing if Ferguson had not left. The court also concluded that Ferguson had knowingly waived his right to a meaningful hearing and that the board had done all that was constitutionally required regarding notice and opportunity to be heard concerning Ferguson's discharge.

Ferguson alleges that the board of trustees deprived him of his statutory and constitutional rights by the manner in which it discharged him. We will first discuss the statutory issues, then the constitutional issues, and finally the legal effect of Ferguon's departure from the hearing.

In I.S. § 33-513 (4), the board of trustees of each school district is given authority to discharge certificated professional personnel for the following reasons:

> "[F]or continued violation of any lawful rules or regulations of the board of trustees or of the state board of education, or for any conduct which could constitute grounds for revocation of a teaching certificate."

While it is apparent from a reading of the statute that school boards are given board authority to define what constitutes grounds for discharge by promulgation of rules and regulations governing professional conduct of school teachers, this provision also establishes that discharge of a teacher must be based upon ru'es and regulations which are "lawful," or for conduct which could constitute "grounds for revocation of a teaching certificate." This subsection also requires that the State Board of Education establish discharge procedures and that local school boards comply with these procedures.

> "No certificated professional employee shall be discharged during a contract term except under procedures prescribed by the state board of education." I.C. § 33-513 (4).

Pursuant to this statute, the following procedure has been prescribed by the State Board of Education:

> "A. A resolution for discharge must be adopted by the local board of trustees and recorded in its minutes. Such resolution must state the reasons for discharge and provide for a hearing. (A form for this resolution is included.)

---

1. "33-513. PROFESSIONAL PERSONNEL. — The board of trustees of each school district including any specially chartered district, shall have the following powers and duties:

. . . .

"4. To suspend, grant leave of absence, place on probation or discharge certificated professional personnel for continued violation of any lawful rules or regulations of the board of trustees or of the state board of education, or for any conduct which could constitute grounds for revocation of a teaching certificate. No certificated professional employee shall be discharged during a contract term except under procedures prescribed by the state board of education."

"B. A copy of the resolution must be delivered to the teacher and proof of a delivery must be obtained.

"C. A hearing must be held upon request of the teacher. The request for a hearing must be made by the teacher within 30 days after receipt of his copy of the resolution for discharge. The board must hold the hearing within 15 days after receipt of the request.
"D. At the hearing the teacher may be represented by counsel, may present evidence, and may examine witnesses.

"E. The board may present evidence substantiating reasons for discharging the teacher, examine witnesses and be represented by counsel.

"F. After said hearing, the board will consider the case in view of all known facts and circumstances and decide by majority vote whether or not the teacher shall be discharged. A record of the decision must be included in the minutes and written notice of the decision delivered to teacher." (Adopted by State Board of Education, September 11-12, 1964, reprinted Clk. Tr., p. 65).

The recommended form for a resolution for discharge (referred to in subparagraph "A" above) was used by the school board in this case and is quoted supra, page 2. The trial court concluded, and we agree, that the school board substantially complied with the discharge procedures established by the State Board of Education pursuant to I.S. § 33-513 (4), at least until Ferguson left the hearing, the effect of which will be discussed below.

Ferguson contends that he had a statutory right to have cause for his discharge established at the hearing, even in his absence. However, neither the statute nor the State Board of Education procedures require such a result. While we agree that the board of trustees could not discharge him except upon its finding of cause as required by I.C. § 33-513 (4), there is no requirement that such cause be established at a hearing unless one is requested by the teacher. A hearing as referred to in the statute denotes the right to confront witnesses, cross examine them, and present evidence on the teacher's behalf. Adams v. Marshall, 512 P. 2d 365 (Kan. 1973); and cf. Application of Citizens Utilities Co., 82 Idaho 208, 351 P. 2d 487 (1960). Ferguson knowingly and wilfully chose not to participate and avail himself of the benefits which the statute intended. We agree with the trial court that he waived his right to the hearing contemplated by the statute and the procedures established by the State Board of Education.

Ferguson does not contest the fact that there had been widespread dissatisfaction with his grading methods for some time among school officials, parents and students.[2] Nor does he contend that he was

2. This record contains several depositions and exhibits from the proceedings for a writ of mandamus before the district court, which substantiate the allegation that Ferguson's unorthodox and arbitrary grading practices had caused conflict between him and the school officials. Thus, while we cannot know what specific information was placed before the board of trustees by the school administrator, we accept the school board's decision that cause for discharge had been established.

unaware that this was the reason that the school administrator had recommended his discharge. The resolution and the minutes of the board of trustees indicate that he was discharged for this reason (which it concluded constitutes "gross neglect of duty" under I.C. § 33-1208 setting forth grounds for revocation of a teaching certificate). This information had been provided by the school administrator to the board at the May 15, 1973, session at which the resolution was adopted. In the absence of any refutation of the information provided by the school administrator, and having in effect waived his hearing, the statutory requirement that a discharge of a teacher be effected only for cause is satisfied in this case.

We turn next to Ferguson's attack on the constitutional sufficiency of the notice and hearing. The Supreme Court of the United States has recently held that the determination of whether a particular right or privilege is a property interest (and is therefore entitled to procedural due process protection under the Fourteenth Amendment of the Constitution of the United States) is a matter of state law. Bishop v. Wood, ____ U.S. ____, 96 S. Ct. 2074 (1976). A tenured teacher for Idaho schools with the right to automatic annual renewal of his teaching contract, I.C. § 33-1212, and the right not to be discharged except for cause, I.C. § 33- 513 (4), Ferguson's teaching position was a property interest and he could not be deprived of this interest without notice and an opportunity to be heard. Cf. Loebeck v. Idaho State Board of Education, 96 Idaho 459, 530 P. 2d 1149 (1975); Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633 (1974); and see Buckalew v. City of Grangeville, 97 Idaho 168, 540 P. 2d 1347 (1975).

The question in this case is whether the procedures followed have satisfied the constitutional test. The United States Supreme Court has not elaborated on the precise procedures to be required in each instance, but has stated that each case turns on the facts and that what is required is an examination of the competing interests involved. Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970). Ultimately, procedural due process — the right to notice of charges and an opportunity to be heard — is a protection againt the arbitrary deprivation of a property right. Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1971).

Ferguson claims that the "Resolution For Discharge of Teacher" was so deficient as to be invalid as notice. He argues that the language used in the resolution regards his discharge as an accomplished fact and improperly places the burden on him to call the hearing and to show cause why he should not be discharged.

We agree with the appellant that the resolution does suggest that the decision regarding his discharge had already been made. We expressly disapprove of its use in the future. However, we do not agree that this necessarily constitutes a violation of due process. The notice clearly informs Furguson of the contemplated discharge, the reasons for such action, and his rights to a hearing, to counsel and to present evidence. To the extent that the notice tended to sound conclusory it was improper, for as we have stated the board could not constitutionally proceed without giving Ferguson notice and the right to a hearing. If this language was misleading, however, we believe that it was cured the night of the hearing when the attorney for the school district stated at the outset:

> "Basically, all I have discussed with the Board is a procedural point and it is my feeling in that the vote as given to Mr. Ferguson only sets forth an accusation, not a final determination by the Board. It would be necessary for the Board or for the District to present testimony one way or the other and for Mr. Ferguson to have the opportunity to cross examine or question anybody that is presented and Wayne — Mr. Hagadone — could you swear witnesses that will be called to testify?"

After making it clear that a decision had not yet been reached regarding his discharge, both the attorney and the board offered to delay the hearing to a later date to give Ferguson time to consult an attorney and to prepare a defense. However, Ferguson declined.

The notice was also in error to the extent that it suggested that the burden was on Ferguson to "[show] reasons why said discharge should not be effected." The burden was on the school district seeking to discharge Ferguson to establish cause for discharge. However, this is not a constitutional requirement, but as we have said, one mandated by I.C. § 33-513 (4). On the other hand, once the school district had established prima facie grounds for discharge, it would have been incumbent on Ferguson to present evidence rebutting the charges. Thus, the information in the notice that Ferguson should be prepared to present rebuttal evidence is helpful, but it is misleading because it appears to put the initial burden of presenting evidence on Ferguson. Again, we believe this problem was cured at the hearing, when the attorney for the school district stated in

Ferguson's presence that he recognized that he had the burden of establishing cause for discharge, and the record indicates that he was prepared to present such evidence.

Ferguson challenges the constitutional adequacy of the hearing in several other respects. He alleges that the board attended the hearing with a biased frame of mind because it had already received evidence of grounds for his discharge. This argument has been raised without success in Griggs v. Board of Trustees of Merced Union High School Dist., 389 P. 2d 722 (Cal. 1964), and more recently in Weissman v. Board of Education of Jefferson County, 547 P. 2d 1267 (Colo. 1976). In these cases, it was claimed that the procedure of the school board whereby it first made an ex parte finding of cause to dismiss the teacher deprived the teacher of a fair hearing because the board then presided over the teacher's dismissal hearing with a biased attitude. The Supreme Courts of Colorado and California rejected the arguments, noting that such a hearing is also in the teacher's interest:

> "[We] believe that the board may properly conduct a limited preliminary inquiry to determine if there is any real substance to the charge against the teacher. The formal hearing process can be both time-consuming and costly, and may subject a teacher to great embarrassment. These adverse consequences may be avoided by a measure of pre-hearing familiarity with the case." 547 P. 2d at 1275.
>
> "We find nothing improper in the conduct of the members of the board . . . . It is . . . .

clear that, before there is any occasion for a public hearing, the board must make an ex parte determination that there is good cause for dismissal, and, in order to be able to make this decision, the board must have some knowledge of the facts." 389 P. 2d at 725-726.

Our consideration of the problem in this case is made more difficult because in the end the board of trustees relied completely on the evidence placed before it at the earlier meeting. However, this fact (brought about by Ferguson's precipitous departure from the hear- has no bearing on the state of mind of the trustees at the hearing and the record suggests that the board was prepared to deal fairly and openmindedly with the issue if the hearing had proceeded.

We find support in our ruling that there is no constitutional infirmity in the school board sitting as decision-makers at this dismissal hearing in the recent United States Supreme Court decision in Hortonville Joint School District No. 1 v. Hortonville Education Assoc., —_ U.S. —_, 96 S. Ct. 2308 (1976). That case dealt with possible bias of school board members at teacher dismissal hearings where the cause for dismissal had been an admittedly illegal strike by the teachers. Rejecting the argument that the school board's participation in the unsuccessful contract negotiations which culminated in the strike made the board biased, the Supreme Court stated:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, dis-

qualify a decisionmaker. Withrow v. Larkin, 421 U.S. 35, 47, 95, S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975); . . ." 96 S. Ct. at 2314.

And the Court concluded:

> "Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was 'involved' in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power." 96 S. Ct. at 2316.

In Withrow v. Larkin, supra, a case arising out of a different factual situation but in which it was claimed that an adjudicative body was biased because it had also been involved in the investigation of charges. The Supreme Court noted that actual bias of a decisionmaker is constitutionally unacceptable but observed:

> "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as ad-

judicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 421 U.S. at 47.

There is no indication in this record of actual bias brought about by the school board's earlier determination that the school administrator had demonstrated to the board cause for discharge of Ferguson, and therefore we conclude that the action of the school board in preliminarily determining that sufficient cause for discharge existed (in order to give Ferguson notice) did not violate due process.

Our assessment of the procedural adequacy of the hearing is made difficult because the teacher left his own hearing without explanation and before any evidence was presented. The trial court found that the board would have proceeded with the hearing if Ferguson had not left, and the record confirms this finding; the attorney for the school district told Ferguson he was prepared to present evidence and again made this statement after Ferguson left to the several school officials, parents and students who attended the hearing as potential witnesses for the school district. Had Ferguson not requested a hearing, the board could have proceeded without hearing evidence. We cannot say that the school board's decision not to hear evidence against Ferguson after he left the meeting was a denial of due process.

Ferguson maintains that by leaving he did not

intend to waive or abandon his right to a hearing. He now contends that he expected that the board would proceed to hear the evidence against him although he said nothing to this effect before leaving. We agree with the trial court that regardless of his intent or expectations at the time he left the hearing, Ferguson waived his right to a hearing and cannot now attack the subsequent actions of the school board.

The judgment of the district court denying Ferguson's petition for a writ of mandamus is affirmed. Costs to respondents.

McFADDEN, CJ., DONALDSON, SHEPARD and BISTLINE, JJ., concur.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

JACOB C. FERGUSON,
Petitioner,

vs.

THE BOARD OF TRUSTEES OF BONNER SCHOOL DISTRICT No. 82, A MUNICIPAL CORPORATION OF THE STATE OF IDAHO, AND VERNON RUE, DR. WILLIAM H. MORTON, JR., VENUS VERHEI, MARIAN EBBETT, and DR. DAVID BEESON, constituting the members of said board,
Respondents.

Case No. 12818

SUMMARY JUDGMENT

The above-entitled action having come on regularly for hearing before this Court on the 29th day of October, 1974, upon Respondent's Motion for Summary Judgment and for an Order Dismissing the Petition herein on the grounds that the action has no merit, and directing that Judgment be entered in favor of Respondents herein; and an Order having been made by this Court, dated and entered in the office of Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, on the 21 day of April, 1975, granting such Motion, and directing that the Petition herein be dismissed and that Judgment be entered, that Petitioner take nothing and that Respondents

recover their costs of suit of and from the Petitioner; NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Petition heretofore filed herein be, and the same hereby is, dismissd, and that the alternate Writ of Mandate, heretofore entered herein, be and the same hereby is, quashed;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED That Petitioner recover nothing by this action against Respondents and that Respondents recover judgment against Petitioner for Respondent's costs and disbursements incurred in this action, taxed herein at $384.25 Dollars.

DATED and DONE this 21st day of April, 1975.

HONORABLE DAR COGSWELL
DISTRICT JUDGE

I hereby certify that a true and correct copy of the foregoing Summary Judgment was mailed postage prepaid this 21 day of April, 1975, addressed to the following:

Peter B. Wilson
Wilson & Walters
Attorneys at Law
P. O. Box 749
Bonners Ferry, Idaho 83805

James E. Hunt
Greene & Hunt
Attorneys at Law
320 North Second Avenue
Sandpoint, Idaho 83864

Mr. E. L. Miller
Miller & Knudson
Attorneys at Law
P. O. Box E
Coeur d'Alene, Idaho 83814

Jill A. Cleghorn, Secretary

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

JACOB C. FERGUSON,
Petitioner,
vs.
THE BOARD OF TRUSTEES OF BONNER SCHOOL DISTRICT No. 82, A MUNICIPAL CORPORATION OF THE STATE OF IDAHO, AND VERNON RUE, DR. WILLIAM H. MORTON, JR., VENUS VERHEI, MARIAN EBBETT, and DR. DAVID BEESON, constituting the members of said board,
Respondents.

ORDER GRANTING RESPONDENT'S SUMMARY JUDGMENT

Case No. 12818

This matter having come on to be heard on the 9th day of October, 1974, upon Respondent's Motion for an Order Granting Summary Judgment against the Petitioner, on the grounds that there is no genuine issue as to any material fact in this action, and that Respondents are entitled to judgment in their favor as a matter of law. The Motion was based upon the file in this cause, the pleadings herein, the Affidavit of Wayne Hagadone on file herein, and on all of the papers and documents filed in support of the Motion.

Petitioner appeared by and through his attorneys of record, JAMES E. HUNT and PETER B. WILSON, and Respondents having appeared by and through

their attorneys of record, LUCINDA WEISS and E. L. MILLER.

Upon due consideration of the records and files in this matter, all pleadings herein, the Affidavit submitted by and on behalf of the parties herein, and all other papers and documents filed by the parties herein, and the oral argument of counsel for the respective parties and the briefs filed by counsel, and this Court having heretofore on the 2nd day of April, 1975, entered its order granting Respondents Summary Judgment, which Order constitutes Findings of Fact and Conclusions of Law in this cause, and the Court being fully advised in the premises; NOW THEREFORE.

IT IS HEREBY ORDERED That Respondent's Motion for Summary Judgment against Petitioner be, and the same hereby is granted, and that Summary Judgment be entered in favor of Respondents and against Petitioner.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED and DONE this 21st day of April, 1975.

HONORABLE DAR COGSWELL,
DISTRICT JUDGE

I hereby certify that a true
and correct copy of the foregoing
Order was mailed, postage prepaid,
at Sandpoint, Idaho, this 21
day of April, 1975, addressed to
the following:

Peter B. Wilson
Wilson & Walters
Attorneys at Law
P. O. Box 749
Bonners Ferry, Idaho 83805

James E. Hunt
Greene & Hunt
Attorneys at Law
320 North Second Avenue
Sandpoint, Idaho 83864

Mr. E. L. Miller
Miller & Knudson
Attorneys at Law
P. O. Box E
Coeur d'Alene, Idaho 83814

Jill A. Cleghorn, Secretary

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

JACOB C. FERGUSON, Petitioner, THE BOARD OF TRUSTEES OF BONNER SCHOOL DISTRICT No. 82, A MUNICIPAL CORPORATION OF THE STATE OF IDAHO, AND VERNON RUE, DR. WILLIAM H. MORTON, JR., VENUS VERHEI, MARIAN EBBETT, and DR. DAVID BEESON, constituting the members of said board, Respondents.	Case No. 12818 ORDER GRANTING RESPONDENTS SUMMARY JUDGMENT

Jacob C. Ferguson, Petitioner, has filed a petition for an Alternative Writ of Mandamus against the Board of Trustees of Bonner County School District No. 82, and the individual Trustees thereof. A pretrial order was entered in this case after a hearing on October 29, 1974.

The Petitioner claims that he was employed as a teacher by respondent School District and he was entitled to a renewal contract as provided in Idaho Code 33-1212.

A renewal contract was offered to the petitioner by the School District but before it was accepted by him and returned to the school office, the Board of

Trustees passed a "Resolution For Discharge Of Teacher" and so notified the petitioner citing reasons therefor.

Ferguson asks that he be restored to his teaching position or in the alternative, that he be awarded damages. Respondents have moved for a Summary Judgment.

The pretrial hearing and subsequent order difines the "issue of law" in this case and the first two issues are jurisdictional, and ones which the Court must determine before proceeding to the remainder.

ISSUES OF LAW

I.

Respondents contend that the District Court is without jurisdiction to issue a Writ of Mandamus and/or Alternative Writ of Mandamus on the ground that the petitioner has an adequate remedy at law.

Idaho Code 7-302 provides that a Writ of Mandamus may be issued to any board:

> " . . . . to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

Idaho Code 7-302 provides:

> "The Writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law . . . ."

As a general rule, Mandamus will not apply unless the party seeking it has a clear legal right to have the act done for which he seeks the Writ, and unless it is the clear, legal duty of the officer to act; it will not lie to coerce or control discretion of an officer (Allen vs. Smylie, 92 Ida 846).

The Court views this action from the records and files as one wherein Ferguson was under contract to teach; he had been offered a tenured contract; before his acceptance he was advised by the District that the tenured contract would not be honored; he was discharged as a teacher and he was advised that he could request a hearing.

A teaching contract is a valuable right which may be enforced by Mandamus in the event the teacher's dismissal is affected by a manner not authorized by law. Ferguson contends the manner of his dismissal was not authorized by law and was unreasonable and arbitrary (See 68 AmJur 2d Sec. 208 Page 532; 52 AmJur 2d Sec. 242 Page 568; and cases cited thereunder).

It is the Court's opinion that Mandamus may be maintained by the petitioner.

II.

However, has the Administrative Procedures Act of the State of Idaho prescribed a remedy to Ferguson that would foreclose a petition for a Writ of Mandamus?

Idaho Code 67-5201 (1) defines "agency" as "each State Board, commission, department, or officer authorized by law to make rules or to determine contested cases . . . . "

A School Board of Trustees is not a State Board. (Idaho Code 33-301) but school districts are under the supervision and control of the State Board of Education (Idaho Code 33-116). Although a school district has been described as an agency of the State to operate a public school system, it is not per se a State Board, commission or department.

It is the opinion of this Court that the Administrative Procedures Act does not apply to the insant case.

III.

Respondents have moved for a Summary Judgment contending there are no material issues of fact to be resolved. The records, files and depositions taken show facts which are without material dispute.

On May 15, 1973, while in executive session, the Board of Trustees received information, testimony and documents concerning Ferguson's teaching practices from the Superintendent and Assistant Superintendents. Ferguson was not present at this meeting. (Dr. Liken's deposition page 7). Base upon the summary it received at the May 15, 1973, meeting, the Board in regular session determined to pass the resolution to discharge Ferguson. It appears to the Court that this resolution was properly adopted (I.C. 33-510). There is no record of the evidence taken at the May 15, 1973, meeting and this evidence was not reiterated at the subsequent June 26, 1973, hearing. The findings of the Board are set forth in the subsequent resolution.

The "Resolution For Discharge of Teacher" provided as follows:

"It is Resolved by:

The Board of Trustees of Bonner County School District No. 82 of Bonner County, Idaho, being fully advised in the premises, and being of the opinion that Jake Ferguson, a teacher in said district, should be discharged for the following reasons:

Applying a grading system for an improper purpose and which does not relate to the level of difficulty of work to such an extent as to constitute gross neglect of duty in failing to report progress of students to parents accurately, and that said acts constitute insubordination in that the teacher has previously been instructed to correct this deficiency and neglected to do so.

A hearing may be requested by Jake Ferguson within 30 days after receipt of a copy of this resolution for the purpose of showing reasons why said discharge should not be effected.

'Said hearing must be held within 15 days after the request is received. At said hearing, the teacher may be represented by counsel and may present evidence on his own behalf and examine any person who may have spoken against him.

It was moved, seconded and carried that the above resolution be adopted."

Signed: William H. Morton, Jr.
Chairman

Wayne Hagadone
Clerk-Treasurer
Bonner County School District
No. 82, Bonner County, Idaho

Ferguson was informed of the resolution on May 16, 1973. On June 12, 1973, Ferguson requested a hearing before the Board of Trustees and a time was scheduled for the same to be held on Tuesday, June 26, 1973. The record of the hearing which convened on June 26, shows that Ferguson was advised of his right to be represented by Counsel, to cross-examine witnesses, and to present testimony and witnesses on his own behalf. (See Affidavit of Wayne Hagadone and attached transcription of hearing).

Ferguson advised the Board of Trustees that he did not wish to be represented by counsel nor to hear testimony, nor to cross-examine any witness. Ferguson stated that he only came to the hearing to ask Dr. Motron, a Board Trustee, questions relating to a newspaper report of his discharge and questions over grievance procedures. Considerable discussion was held with the Board of Trustees, Ferguson, the Board attorney, and School Superintendent Likens over the procedure to be followed in discharging a teacher and the newspaper publicity involved.

Ferguson was asked if he wanted to continue the hearing in order to consult with an attorney and he stated that he did not. Ferguson then stated: "I am through — thank you very much," and left the hearing.

Heaving received no evidence to the contrary, Dr. Morton then made a motion that was passed by the Board to follow the Administration's recommen-

dations that were previously received on May 15, and dismiss Ferguson as a teacher. No further testimony was presented at the hearing by either the District or by Ferguson.

The balance of the questions of law, as set forth in the pretrial order, will be handled jointly and are as follows:

A. In discharging the petitioner respondents contend it proceeded under the terms of Idaho Code 33-513 (3) and (4). Was this a proper statutory procedure to be followed?

B. Was the petitioner accorded a meaningful hearing before the Board of Trustees prior to his discharge?

C. What satisfies the legal requirements of "an informal review of such decision" as specified in Idaho Code 33-513?

D. Does the School District have the burden to produce evidence at any such hearing in order to show that the petitioner should be discharged as a teacher, or is the burden on the teacher to produce evidence in the nature of a judicial show cause in order to convince the Board of Trustees that he should not be discharged?

E. Does the record, pleadings, and affidavits filed herein show that the petitioner requested a hearing before the Board of Trustees but refused to proceed with the same and, in effect, abandoned his request for a hearing? Should the petitioner have been considered in default by the Board of Trustees?

F. If there is no material issues of fact concerning subparagraph D above, does the burden still lie with the School Board to call witnesses and present

evidence at a hearing to reaffirm its decision previously made to discharge the teacher?

Although it is not entirely clear from the original proceedings, the records, files and briefs indicate that the School District was proceeding under Idaho Code 33-513 (3), which provides in part as follows:

> The Board of Trustees . . . shall have the following powers and duties:
>
> (3) "To suspend, grant leave of absence, place on probation or discharge certificated professional personnel for continued violation of any lawful rules or regulations of the Board of Trustees or of the State Board of Education, or for any conduct which could constitute grounds for revocation of a teaching certificate. No certificated professional employee shall be discharged during a contract terms except under procedures prescribed by the State Board of Education."

The State Board of Education adopted procedures in September, 1964 (See affidavit of Wilson with attachments).

The procedure to be followed is specified as follows:

A. A resolution for discharge must be adopted by the local Board of Trustees and recorded in its minutes. Such resolution must state the reason for discharge and provide for a hearing. (A form for this resolution is included).

B. A copy of the resolution must be delivered to the teacher and proof of a delivery must be obtained.

C. A hearing must be held upon request of the teacher. The request for a hearing must be made by the teacher within 30 days after receipt of his copy of the resolution for discharge. The Board must hold the hearing within 15 days after receipt of the request.

D. At the hearing the teacher my be represented by counsel, may present evidence, and may examine witnesses.

E. The Board may present evidence substantiating reasons for discharging the teacher, examine witnesses and be represented by counsel.

F. After said hearing, the Board will consider the case in view of all known facts and circumstances and decide by majority vote whether or not the teacher shall be discharged. A record of the decision must be included in the minutes and written notice of the decision delivered to the teacher.

It would appear to the Court that the district substantially complied with the various steps set forth in the procedure adopted by the State Board of Education, at least up until the hearing itself on June 26, 1973. The transcript of what transpired at the hearing shows conclusively that the members of the Board were in doubt as to how to proceed and what legal effect their resolution of discharge of May 15, in fact, had upon these proceedings.

The Board attorney advised Ferguson that the resolution of May 15, was an " . . . . accusation, not a final determination by the Board. It would be necessary for the Board or for the district to present testimony one way or the other and for Mr. Ferguson to have the opportunity to cross-examine or question anybody that is presented . . . . "

At another stage Ferguson was advised by the Board attorney that " . . . . this does not mean that the action taken at that point is final . . . . the Board would have still have been required to take additional action in order to terminate a contract. So, at this point the contract would not be terminated."

Mr. Ferguson asked: "What you are saying is that they have not heard all of the evidence as of this time."

The attorney answered: "This is correct . . . . "

After the resolution to discharge was read to Ferguson, Trustee Ruen advised Ferguson " . . . . then the hearing is for you . . . . to justify your grading system . . . . "

The attorney again stated he was ready to present testimony and Ferguson stated he didn't care to hear the testimony but if he could ask a question, the Board could go ahead with their hearing. Thereafter, a long dissertation followed concerning the steps of grievance procedures and newspaper publicity on this matter.

The colloquy between Ferguson and the Board members indicate that the Board members felt the information presented against Ferguson on May 15, was sufficient for his dismissal and that Ferguson then had the burden at the hearing on June 26, to change the mind of the Board members. As Chairman Ruen stated to Ferguson " . . . . this is an opportunity for you to show us where you were right and we possibly either did not understand the situation or misinformed or whatever."

However, the facts are without dispute that the Board of Trustees had witnesses available at the hear-

ing and the Board attorney was ready to proceed, assume the burden of proof, and call witnesses to testify concerning Ferguson's activities.

Although Ferguson requested the hearing, he continually refused to participate in the hearing, stated that he did not desire to hear any of the witnesses that the Board attorney was going to call, and left the hearing room before any witnesses were presented.

By Ferguson's actions the entire procedure prescribed by the State Board of Education to discharge a teacher took on an unusual atmosphere. If Ferguson had never requested a hearing, the matter would have terminated with the passage of the "Resolution For Discharge of Teacher" on May 15.

Ferguson was entitled to a meaningful hearing where he could hear the evidence the Board had previously considered and present evidence on his own. However, it would be a useless act for the Board to again take and receive the same information after Ferguson had refused to participate and had departed.

The Supreme Court of the United States has announced many times that the central meaning of procedural due process is that a person whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner by proper notice given. However, the hearing required is subject to waiver.

In this case a teacher can waive his right to a hearing by not requesting one (Tucker vs. San Francisco Unified School District (Cal) 45 P2d 597).

Likewise a teacher can waive his right to a hearing by requesting one but subsequently refusing to

participate. What the Constitution does require is "an opportunity" for a hearing. Ferguson was granted such an opportunity. The Board and its attorney were more than accommodating in advising Ferguson of his right to counsel, to a continuance, his right to examine witnesses, and present witnesses in his own behalf. Ferguson, with full and complete knowledge, waived this opportunity to participate in the hearing which he had called, and the District has complied with all of the requirements set forth by the State Board of Education (See Boddie vs Connecticut, 91 SuCt 780 at page 786; and cases cited in Fuentes vs Shevin 92 Suct 1893 at page 1994, as to the meaning of full hearing under due process clause.)

After Ferguson declined to proceed with the hearing, the Board acted properly in passing the final motion to dissolve Ferguson's employment on the "known facts and circumstances" it previously had before it from Dr. Likens.

Considering all of the records and files, it is the Court's opinion that:

1. The respondents have substantially complied with the provisions of Idaho Code 33-513 (3), the procedures adopted by the State Board of Education to discharge a teacher and with the "due process clause" of the Constitution.

2. Petitioner has knowingly waived his rights to a meaningful hearing concerning his discharge.

3. There are no material issues of fact to be resolved by the trier of fact.

4. A Summary Judgment should be entered in favor of the respondents and against the petitioner

dismissing the petition for Writ of Mandamus or Alternative Writ of Mandamus.

5. Court cost are awarded to respondents.

6. The foregoing Order shall constitute Findings of Fact and Conclusions of Law.

7. Will attorneys for the respondent prepare the Summary Judgment for filing and service.

DATED this 2nd day of April, 1975.

Dar Cogswell
District Judge

I certify that a true and correct
copy of the foregoing was mailed,
postage prepaid, on this 7 day
of April, 1975, to:

James E. Hunt
Peter B. Wilson
Lucinda Weiss
E. L. Miller

EXCERPTS FROM TRUSTEE MEETING

No. 522 Held
July 26, 1973

Mr. Featherston: I just briefly discussed with Mr. Ferguson, just before the meeting, this procedural point, it is a feeling, as I understand it, that you just wanted to question some people.

Mr. Ferguson: Yes.

Mr. Featherston: You didn't want to present anybody independently.

Mr. Ferguson: No.

Mr. Featherston: This may have some bearing on the procedure you want to follow — if you want to vary your procedure due to this, it will be fine. Is it strictly members of the Administration or Board?

Mr. Ferguson: School Board members.

Mr. Featherston: Just school Board members?

Mr. Ferguson: Yes.

Dr. Morton: Mr. Chairman, if I may, I would prefer to have the district's witnesses called one by one and to have all witnesses excluded except during the time of testimony.

Mr. Verhei: Do you want to make that a motion?

Dr. Morton: I would move that we call the witnesses individually and have them in the room only during the time of testimony, subject to recall.

Mr. Ferguson: If I might interject, I really don't care to hear any testimony and I don't care to question anybody except the Board Members. You can

hear all the witnesses that you like — I just came here this evening to question you as a matter of fact, because you were the Chairman of the Board when the action was started.

Dr. Morton: This is correct.

Mr. Ferguson: And I only have one question . . .

* * *

Mr. Ruen: Did I understand you correctly in that you said you didn't care about hearing anything?

Mr. Ferguson: That's correct.

Mr. Ruen: That you came here to ask one question . . .

Mr. Ferguson: Yes.

Mr. Ruen: . . . is it your feeling that you'd like to at some stage of this thing — as I understand you —

Mr. Ferguson: Yes . . . Maybe if I made a statement it would . . . I might clarify what I am thinking. The letter indicates a certain amount of evidence has been received by the Board. I assume that they have received all of the evidence, whatever it is to date — that they have made their decision to dismiss me based on this evidence, is this not true?

Mr. Featherston: If I might make a point of clarification for Mr. Ferguson at this point . . . unfortunately the way the law requires that these procedures be set out — is that the Board make a cursory or a finding that there is some substance or some reason why a hearing should be held. A hearing held and further action as to a teachers contract — and at that point, based on that, they make and pass a Resolution and send out a notice to the teacher advising him of this and this does

not mean that the action taken at that point is final, assuming that there was no hearing held whatsoever, the Board would still have been required to take additional action in order to terminate a contract. So that at this point, the contract would not be terminated.

Mr. Ferguson: What you are saying is they have not heard all the evidence as of this time.

Mr. Featherston: This is correct . . . it is very similar to in law, you have criminal and civil law, where you have an individual sign a complaint or whatever, and in this case, the school district, the Board, is the only one authorized to send out this notice. The administration, School District, Attorney, parents, are not authorized to send out this notice to a teacher.

Mr. Ferguson: If I had not requested this hearing then there would be no hearing, is that correct?

Mr. Featherston: There would still have to be some type — some type of a . . .

Mr. Ferguson: Well, yes, at a regular Board meeting they would decide to continue along with the process that they had started.

Mr. Featherston: This would be a default procedure, yet, there would be nothing shown to the contrary . . .

Mr. Ferguson: That is why I had assumed that the Board had received all the evidence.

Mr. Featherston: No, I think you were advised in the notice that you had the right to legal counsel also.

Mr. Ferguson: Oh-yes.

Dr. Morton: Why don't we read the resolution again verbatim so that we know what we are talking about here. It has been sometime since some of us have read it.

Dr. Likens: May 15, 1973 — RESOLUTION FOR DISCHARGE OF TEACHER — It is Resolved by: The Board of Trustees of Bonner County School District No. 82, of Bonner County, Idaho, being fully advised in the premises, and being of the opinion that Jake Ferguson, a teacher in said District, should be discharged for the following reasons:

Applying a grading system for an improper purpose and which does not relate to the level of difficulty of work to such an extent as to constitute gross neglect of duty in failing to report progress of students to parents accurately, and that said acts constitute insubordination in that the teacher has previously been instructed to correct this deficiency and neglected to do so.

A hearing may be requested by Jake Ferguson within 30 days after receipt of a copy of this resolution for the purpose of showing cause why said discharge should not be effected.
Said hearing must be held within 15 days after the request is received. At said hearing, the teacher may be represented by counsel and may present evidence on his own behalf and examine any person who may have spoken against him.
It was moved, seconded and carried that the above resolution be adopted . . .

Mr. Ferguson: That sounds pretty conclusive to me. Like I say, from that, I assumed that the Board had heard all the evidence.

Mr. Ruen: Well, actually, that is the reason for the hearing. It says, the Board, in essence, is of the opinion that what they know at that point is legal to believe, shall we say, that a teacher should be discharged — then the hearing is for you, if you ask for a hearing, to justify your grading systems, to do whatever you choose — because if you ask for a hearing, the assumption is that you don't agree with the reason up to that point and this is to let you present your reasons for . . .

Mr. Ferguson: That's right, and I have, as I said, just one question that I wish to ask and as far as I am concerned that's all I am here for. If you would like to hear more evidence—I don't understand how a Board can take action on only part of the evidence — but that is your business, not mine.

Mr. Ruen: No action has been taken.

Dr. Likens: It is initiated though.

Mr. Ruen: Yes, we have, this is right — it is initiated — but some of these things are governed by state law and we have to do things in a certain way. Whether we like it or whether you like it. This resolution is something that is required by law to be done in a certain way and to word it exactly to say what we are trying to say is a difficult thing in itself because even that is . . .

Mr. Ferguson: Well counselor, since you are the legal mind — how do we proceed?

* * *

Mr. Ferguson: I mentioned to you outside that I had requested the hearing and I mentioned to

these gentlemen that I really don't care to hear any testimony and I care not to question anyone. So if it is all right with you, I will go ahead with my question and then you can go ahead with your hearing — or with my hearing.

Mr. Featherston: I would agree with this variation in this procedure . . . it wouldn't make any difference to me.

Dr. Morton: I wonder if, in the interest of justice all the way around, it wouldn't be wise to again remind Mr. Ferguson that he can have the opportunity to retain counsel.

Mr. Ferguson: Can I ask you a question, Dr. Morton?

Dr. Morton: Surely.

Mr. Ferguson: In the interest of justice, you have a procedure, I believe, that suggests that if there is some difficulty — that it go through the administrative steps — Principal, Superintendent and Board, isn't that correct, is there such a procedure in your manual?

Dr. Morton: This is true.

Mr. Ferguson: Before you published my proposed dismissal in the paper, why wasn't that procedure followed?

Dr. Morton: I think that as far as the Board is concerned, in concept, that procedure was followed.

Mr. Ferguson: Oh, I see.

* * *

Mr. Ferguson: Well, then, why wasn't that procedure followed?

Dr. Morton: As far as the Board is concerned, it was followed and it would have to be proven differently before the board would know any differently.

Mr. Ferguson: Maybe I misread the manual but I undersood that the process was that if a Principal and a Teacher could not resolve their differences they were to go to the Superintendent — if the Superintendent and the Teacher could not resolve the differences, then they were to go to the Board.

Dr. Morton: It is the Board's understanding this procedure was followed and if it is your understanding it wasn't followed, then it is up to you to prove it wasn't.

Mr. Ferguson: I think that is quite clear because I requested this hearing . . .

Dr. Morton: It is not clear to me — without some proof, I am only speaking for myself now.

Mr. Ruen: Would you explain that a little bit . . . it is not quite clear to me what you mean.

Mr. Ferguson: There is a grievance procedure adopted by the School Board of this District and I am just going from my cursory understanding — that if a Principal and a Teacher cannot reconcile a difference, regardless of what it is, then they are supposed to go to the Superintendent. If their differences cannot be reconciled at that level, then the whole matter goes to the School Board . . . and then if it can't be reconciled at that level, where it would go, I don't know. But, in this case, the last time I talked with Dr. Likens, was in September, last year. Since then, I have talked with the Administrator at the Junior High

school whenever a problem arose. O.K., I was told by that Administrator on Monday — when we had a difference of opinion — I am going to take this to the Superintendent. On Wednesday, the Superintendent was in the Junior High School office with Mr. Lamanna and the two Administrators at the Junior High School and he read his letter to me. Now, I don't believe that that's following the procedure.

Dr. Morton: It may be well to get out the policy manual and just review it . . .

* * *

Dr. Likens: In terms of grievance, in terms of teacher evaluation and teacher disciplinary action, a different procedure is followed.

Dr. Morton: A grievance, by my definition has to do with working conditions, salaries . . .

Mr. Verhei: Well, of course, on a broader term, this would be a grievance too.

Dr. Likens: A grievance is basically after an administrative recommendation or decision has been made.

Mr. Verhei: Yes, but then does the policy state that the teacher and the principal is supposed to contact the administrator?

Dr. Likens: Either one, the teacher or administrator can contact me, the superintendent, to try and set down with the two of them to resolve a grievance . . .

* * *

Mr. Featherson: This type of matter, in my opinion, is covered by statutory and case law and general

due process of procedures and this is what we are attempting to do at this time is to follow due process — there has been a dispute — I wouldn't even call it a dispute — there has been a complaint by a teacher on the professional level of a professional nature and it comes to the matter of due process — the Administration has made the recommendation of termination and the next step is the hearing which Mr. Ferguson has requested.

Mr. Ferguson: But if I hadn't of requested it, your process would be to just go ahead with the dismissal, right?

Mr. Featherston: Yes, but default hearing — just like any lawsuit, Mr. Ferguson.

* * *

Mr. Verhei: Then my understanding, that what Mr. Ferguson said was correct as far as what my understanding concerned was — that if a teacher and principal cannot settle differences they take it to the Administration and if they can't settle it they take it to the Board — has this been your understanding, Vern?

Mr. Ruen: Well, with citizens, we've never been in this thing before . . . this is our first time for this.

* * *

Dr. Morton: I am satisfied, Mr. Chairman, that we are moving in the proper legal circumference — this is what concerned me.

Mr. Ferguson: What have you decided to do?

Dr. Morton: We don't know yet.

Mr. Ruen: That is why we are here — for you to help us decide if you have reason to believe that we don't have all the facts as you see them.

Mr. Featherston: You desire to present anything first?

Mr. Ferguson: I just have one question to ask of Dr. Morton.

Mr. Featherston: Do you want to ask that now — before we proceed?

Mr. Ferguson: I might as well:

Mr. Featherston: Why don't you do that.

Mr. Ferguson: Dr. Likens read the letter you sent me and it states in there reasons why the Board is recommending my dismissal and you are, I am sure, are aware of the facts in the letter.

Dr. Morton: This is correct — keep in mind, Mr. Ferguson, the Chairman signs this after action by the Board.

Mr. Ferguson: Well, because you signed it and were Chairman of the board at that time is why I am addressing you. The thing I would like to determine is that on the evidence that the Board was presented — which resulted in this letter, do you feel that this evidence is all true and sufficient for my dismissal?

Dr. Morton: Well, if you are asking me to speak for the Board, I can't do that—I can speak for myself and I think you would have to inquire of each Board member to get their individual reactions to your question. There is a question in my mind whether it is all true and that's why a hearing was indicated.

Mr. Ferguson: Dr. Morton, if I hadn't requested this hearing you wouldn't of had it and you would have gone ahead with my dismissal.

Dr. Morton: Then my assumption would have been that if you had not requested a hearing that the allegations were correct. How else could I assume?

Mr. Ferguson: Fine.

Dr. Morton: But because I was not sure in my mind and because I am certain the other Board Members probably feel this way, you were granted, according to law, the opportunity to have a hearing.

Mr. Ferguson: But, Dr. Morton, if you weren't sure in your mind — why didn't you call the hearing . . .

Dr. Morton: Well, essentially this is what we did.

Mr. Ferguson: No, you didn't, I called the hearing.

Dr. Morton: Well I think it is a moot point really.

Mr. Ferguson: Well I think it is very important because you publicized in the paper that I was dismissed by unanimous vote.

Dr. Morton: Well I don't know whether that was the case or not now — I would have to see a newspaper article. Newspaper reporters are present and honestly I cannot remember what the newspaper article was — maybe you are right. I don't know.

Dr. Likens: In fact I have watched very carefully and I never did see a statement on this particular case.

Mr. Verhei: I saw the statement — his statement is correct.

Dr. Morton: This could be — I'm sorry to say that many times what reporters have to say about school board meetings or city council meetings or county commissioner meetings sometimes are not too accurate — maybe in this case they were accurate — I would like to know what the article said because I don't recall having seen it myself.

Mr. Ferguson: It was a sentence hidden in the last paragraph of the minutes of the Board meeting — of the writeup of the Board meeting — just one sentence that stated that the Board had unanimously voted to dismiss Mr. Ferguson.

Dr. Morton: This is one reporter's interpretation, you see.

Mr. Verhei: I think that was right — I think that it was unanimous . . .

Dr. Morton: We have not unanimously decided to dismiss him but have unanimously decided to send the resolution to him.

Mr. Verhei: That's right — it was a unanimous decision of the Board that was the action taken.

Dr. Morton: Yes, to send the resolution, right. But certainly is not tantamount to dismissal.

Mr. Ferguson: But the question I am asking you is that at that point did you feel that the evidence that you had been presented was true and was sufficient for my dismissal?

Dr. Morton: My answer to that is, yes sir, I did, and I am glad you came here tonight because maybe

you will do something to change my mind.

Mr. Ferguson: Well, I am not going to do anything to change your mind, because I think you have already made up your mind.

Dr. Morton: Then you don't know me very well, Mr. Ferguson, and I'm sure you don't know the other board members very well either.

Mr. Ferguson: Then if there is any doubt in your mind — you had better call another meeting after this one and get all the facts.

Dr. Morton: I think I suggested, twenty minutes ago, didn't I Mr. Chairman, that we continue this so Mr. Ferguson could obtain counsel and could continue this hearing further.

Mr. Ruen: Yes, he can obtain anybody he chooses and present any statements — this is right, you did. I can see no reason why the Board would not go along with this — this is an opportunity for you to show us where you were right and we possibly either did not understand the situation or mis-informed or whatever.

Mr. Ferguson: This is what I just cannot understand — it just doesn't make sense to me — that you people including the Superintendent, would, after the Administration at the Junior High School and I had supposedly reached an impass, would not continue your procedure — which is normally as I say, have the Superintendent review all the information with persons involved and if the agreement cannot be reached then the Board listen to all of the arguments — both sides — before you make any decision like this one and which you publicized in the paper.

Mr. Featherston: Mr. Ferguson, is this a formal notice published in the paper that you are referring to — or is this an editorial or a recorded part of the paper — is this in the legal notices?

Mr. Ferguson: As far as I am concerned I could care less where it is — it was in the paper and it did me personal damage.

Mr. Featherston: Was this in the legal notices?

Mr. Ferguson: No, it was not — it was a write-up of the Board meeting and what had transpired at the Board meeting.

Mr. Featherston: Presumably by the reporter or the editor of the paper, is this correct?

Mr. Ferguson: Yes.

Mr. Featherston: O.K., then it's your contention that the Board paid the editor or the reporter to put this notice in, in this form?

Mr. Ferguson: I have no idea what the arrangements were — I don't know how the newspapers get the Board minutes, whether they go listen to the Board or whether the Board sends copies of the minutes.

Mr. Featherston: It's not your contention that this is a paid advertisement or a paid legal notice in the paper that advised the public that you were terminated — it's just general reporting by the newspapers . . .

Mr. Ferguson: Information that the paper must have received by some action, I have no idea how.

* * *

Mr. Ruen: . . . We went into executive session and

said it looks like that we have a problem that needs to be resolved and the law says certain things — the way to spell it out and give you an opportunity and say how many days you have according to law and the whole works to come and show us where we were wrong — we took this action — we came back out and voted on it in public and that was the action taken — sometimes, reporters report things that I don't like too . . . because they don't sometimes probably hear it all they don't understand it all, but this thing in the paper was not . . . it was an attempt, I suppose by, this is the Bee, I think . . .

——— No, it was in the other paper.

Mr. Ferguson: It was in both of those.

Mr. Ruen: Oh, was it? Well then they probably . . .

Dr. Likens: That particular night, there was neither paper represented.

Dr. Morton: It just went in the minutes then?

Dr. Likens: That's right . . . the minutes are clear — you can get them out and read them.

Dr. Morton: All the minutes are back from the year one for the public to read.

Mr. Featherston: I would like to proceed then if — are you through with the questioning.

Mr. Ferguson: I'm through . . . thank you very much.

(Mr. Ferguson left the hearing at this time — 9:40 P.M.)

EXHIBIT "1"

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

JACOB S. FERGUSON, Petitioner, vs. THE BOARD OF TRUSTEES OF BONNER SCHOOL DISTRICT No. 82, A MUNICIPAL CORPORATION OF THE STATE OF IDAHO, AND VERNON RUE, DR. WILLIAM H. MORTON, JR., VENUS VERHEI, MARIAN EBBETT, and DR. DAVID BEESON, constituting the members of said board, Respondents.	No. 12818 PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

TO: The District Judge of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner:

Based upon the facts hereinbelow outlined, petitioner respectfully petitions the court that an Alternative Writ of Mandate be issued against Respondents.

AFFIDAVIT

STATE OF IDAHO } ss
County of Bonner }

JACOB C. FERGUSON, being first duly sworn, deposes and says:

I.

That affiant was employed by respondent School District under Title 33 of the Idaho Code; and that affiant's employment was of sufficient length and continuity to bring into play I.C. 33-1212.

II.

That, notwithstanding the foregoing, respondents, on May 15, 1973, discharged affiant as shown by Exhibit A attached hereto and made a part hereof as though fully set forth at length herein.

III.

That respondents gave no notice to petitioner that the action taken as shown by Exhibit A was under consideration, no hearing was held relative to the action by the Board in discharging affiant; no compliance with established procedure of the local district was made, and no hearing was held relative to such action by the board, and that by virtue of the aforesaid statutes petitioner had a vested property right in continuing employment with respondent; that petitioner was never advised as to whether the procedure was under I.C. 33-513 or I.C. 33-1212 or under some other section of the Idaho Code.

IV.

That affiant demanded a hearing anyway; and that respondents scheduled a hearing for June 26,

1973 (as shown by Exhibit B attached hereto and made a part hereof as though fully set forth at length herein); but that, while a meeting of people was had at that time, no hearing was held in that no evidence was submitted by anyone for or against petitioner.

V.

That affiant, as shown by Exhibit C, which is attached hereto and made a part hereof as though fully set forth at length herein, demanded that respondents provide him with a list of accusers prior to the hearing; but that respondents refused to comply with said demand prior to the scheduled date of the hearing, though respondents did submit a list of names from whom they said they would "select witnesses."

VI.

That there is no existing evidence obtained at a lawful hearing warranting the aforesaid action of the respondents.

VII.

That respondents refuse to permit affiant to resume his duties with said School District No. 82.

VIII.

That affiant has been, and now is, ready, willing and able to resume his duties in the position for which he was employed by respondents.

IX.

That affiant has no plain, speedy or adequate remedy in the ordinary course of law.

X.

That affiant is informed, believes and therefore states this to be that the 1973-74 school year salary for affiant would have been Ten Thousand Dollars ($10,000.00); that petitioner has ten (10) years of his life remaining in which he is eligible to teach in said school district before mandatory retirement. and that respondents' change in future salary schedules in the next ten-year period would amount to a total additional income of Seven Thousand Six Hundred Dollars ($7,600.00).

XI.

That respondents, during said ten-year period would put in petitioner's retirement fund the sum of Six Thousand Dollars ($6,000.00); that during said period health and accident insurance premiums of a Two Thousand Two Hundred Dollars ($2,200.00) value for petitioner's benefit would be provided by respondents; and that social security payments by respondents on behalf of petitioner for said period would total $5,850.00.

XII.

That in 1972, without notice of hearing, respondents removed petitioner from his coaching position, and this amounted to a loss of income of $1,500.00 per year, and that affiant was then entitled to eleven (11) years' more service to said School District before his mandatory retirement.

VIII.

That due to respondents' conduct, affiant will expend approximately Ten Thousand Dollars ($10,000.-00) in legal fees and expenses in this proceeding.

XIV.

That respondents' conduct has damaged petitioner's name and professional standing by not less than Three Hundred Thousand Dollars.

DATED this 20th day of December, 1973.

Jacob C. Ferguson
affiant

SUBSCRIBED and sworn to before me this 20th day of December, 1973.

Ruth McBurney
Notary Public for Idaho
Residing at Sandpoint
Com. Exp. 9/1/77

WHEREFORE, petitioner prays that an alternative writ of mandamus be issued by this court directed to respondents commanding them to forthwith reinstate petitioner to his former position with salary covered coaching duties at a salary of TEN THOUSAND DOLLARS ($10,000.00) per year teaching and ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00) per year coaching for the full 1972-73 school year plus interest at the highest allowable rate for each delinquent monthly increment from its due date together with reasonable attorney fees, expenses and costs of this proceeding of TEN THOUSAND DOLLARS ($10,000.00), along with THREE HUNDRED THOUSAND DOLLARS ($300,000.00) for damages to petitioner's professional name and standing; or, in the alternative, the following compensation in lieu of employment:

1. $107,600.00 — ten years' salary
2. 6,000.00 — retirement deposits

3. 2,200.00 — health and accident premiums
4. 5,850.00 — social security benefits
5. 15,000.00 — coaching salary
6. 10,000.00 — legal fees, expenses and costs
7. 300,000.00 — damage to name and professional standing

$436,650.00 PLUS interest at the highest allowable rate for each delinquent monthly increment from its due date;

OR, in the alternative, to show cause if any they have, why respondents have not complied with either alternative.

DATED this 20th day of December, 1973.

GREENE & HUNT
Attorneys at Law
Sandpoint, Idaho
James E. Hunt

WILSON & WALTER
Attorneys at Law
Bonners Ferry, Idaho
By Peter B. Wilson
Attorneys for petitioner

STATE OF IDAHO
County of Bonner } :ss

JACOB C. FERGUSON, being duly sworn, states as follows:

That he is the petitioner in the foregoing petition, that he has read the petition, and the facts herein stated are true to the best of his knowledge.

Jacob C. Ferguson

SUBSCRIBED and sworn to before me this 20th day of December, 1973.

Ruth McBurney
Notary Public for Idaho
Residing at Sandpoint
Com. Exp.: 9/1/77

EXHIBIT A

RESOLUTION FOR DISCHARGE OF TEACHER

May 15, 1973

It is Resolved by:

The Board of Trustees of Bonner County School District No. 82 of Bonner County, Idaho, being fully advised in the premises, and being of the opinion that Jake Ferguson, a teacher in said district, should be discharged for the following reasons:

Applying a grading system for an improper purpose and which does not relate to the level of difficulty of work to such an extent as to constitute gross neglect of duty in failing to report progress of students to parents accurately, and that said acts constitute insubordination in that the teacher has previously been instructed to correct this deficiency and neglected to do so.

A hearing may be requested by Jake Ferguson within 30 days after receipt of a copy of this resolution for the purpose of showing reasons why said discharge should not be effected.

Said hearing must be held within 15 days after the request is received. At said hearing, the teacher may be represented by counsel and may present evi-

dence on his own behalf and examine any person who may have spoken against him.

It was moved, seconded and carried that the above resolution be adopted.

Signed:
William H. Morton
Chairman

Wayne Hagadone
Clerk-Treasurer
Bonner County School District
No. 82, Bonner County, Idaho

EXHIBIT B

June 14, 1973

Jacob C. Ferguson
P.O. Box 366
Hope, Id. 83836

This is to acknowledge receipt of your request for a hearing before the Board of Trustees of Bonner County School District No. 82, concerning your dismissal as a teacher in the Bonner County School District. Your requested hearing is scheduled at 9:00 o'clock p.m., or as shortly thereafter as possible, on Tuesday, June 26, in the Administration Office of Bonner County School District No. 82, Sandpoint, Idaho, this being the date set by the Board for a special meeting to consider other business.

The requested list of persons who have spoken against you will be provided to you by the Administration on or before June 21, 1973.

Sincerly,

William H. Morton, Jr., D.V.M.
Chairman Pro-Tem

cc.: District Superintendent
Assistant Superintendent
Clerk-Treasurer
District Attorney
Board members

WHM:ds

EXHIBIT C

P. O. Box 366
Hope, Id. 83836
June 12, 1973

Dr. William Morton, President
Bonner County School Board
Bonner County School District
Sandpoint, Id. 83864

Dear Sir:

I request that a meeting of the Bonner County School Board be held at your earliest convenience, as a hearing, concerning my dismissal as a teacher in the Bonner County School District.

I further request that a list of all persons who have spoken against me be submitted to me prior to the hearing.

Sincerely,
Jacob C. Ferguson

Idaho Constitution, Article IX, Section 1

"The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.

77-402

No. _____

In the Supreme Court of the United States

October Term, 1977

Jacob C. Ferguson, Petitioner

v.

The Board of Trustees of Bonner County School District No. 82, A Municipal Corporation of the State of Idaho, and Vernon Ruen, Dr. William H. Morton, Jr., Venus Verhei, Marian Ebbett, and Dr. David Beeson, constituting the members of said Board, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION to Petition for a Writ of Certiorari

To the Supreme Court of Idaho

E. L. Miller
MILLER & KNUDSEN
P.O. Box E
Coeur d'Alene, Idaho 83814

Jon Hammarberg
HERNDON, HAMMARBERG & HANLON, CHARTERED
P.O. Box 216
Sandpoint, Idaho 83864
Counsel for Respondents

James E. Hunt
GREENE & HUNT
Peter B. Wilson
WILSON & WALTER
Box 749
Bonners Ferry, Idaho 83805
Counsel for Petitioner

September 26, 1977

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heard, he knew his right to counsel, he knew his right to cross-examine witnesses and he still knowingly and voluntarily walked out of the proceedings.

ARGUMENT

THIS CASE SHOULD NOT BE REVIEWED BY THE SUPREME COURT SINCE THE IDAHO SUPREME COURT HAS DECIDED THIS CASE IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, THE CONSTITUTION AND LAWS OF THE UNITED STATES AND THE STATE OF IDAHO.

In deciding this case, the Idaho Supreme Court carefully reviewed several decisions of this Court having to do with due process procedures, including the cases of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1971); and Hortonville Joint School District No. 1 v. Hortonville Education Association, ____U.S. ____, 96 S.Ct. 2308 (1976). The Petitioner argues that because the notice sent to him gave him the impression that he was already discharged he was denied due process and an arbitrary taking had already occurred. This was not the case in reality, and Petitioner was advised that his contract had not been terminated at the hearing. Further, the notice did not state that he "was" discharged, but that he "should" be discharged. The Petitioner contends correctly that Fuentes, supra., states that ". . . no later hearing . . . can undo the fact that the arbitrary taking that was subject to the right of due process has already occurred." The Fuentes case concerned the repossession of personal property. In that case the property was actually taken away from the individual prior to any

type of notice of hearing. In the instant case no such actual taking of any property right had occurred prior to notice and the hearing. Therefore there was no attempt to correct a taking without due process.

Petitioner's contention that the notice did not advise him of the charges and a right to a hearing is incorrect. The notice specifically set forth the reasons for his proposed discharge and specifically notified him of his right to a hearing, to counsel, to present evidence and to question witnesses. (Appendix A, pp 15-16)

Petitioner states that he was under the impression that ". . . he had been fired . . . ," however he was specifically advised that he had not been fired as of that point in time and that if he wanted to request a continuance of the hearing he could do so.

In each of the cases decided by this Court it has been held that due process requires that an opportunity for a hearing be given to an individual who may be deprived of a property right. This opportunity was given to Petitioner and he refused to take the opportunity. To allow a person to take the actions Petitioner took in this case, would be to allow a person to set up any adjudicative body in order that said body could never take any actions without falling into a trap set by the individual involved. The Board in this case gave to the Petitioner every chance to participate in a meaningful manner and he willfully, voluntarily, and knowingly refused.

Concerning the contention that the Board could not make an unbiased decision because of its investigative role, the Respondents have shown, throughout the proceeding, as seen in Appendix A, that no such prejudice existed. The Respondents are vested by statutes with the duty and responsibility of running the School District. Respondents therefore would, of necessity, be required to investigate any matter having to do with its statutory

responsibilities. This Court stated in Hortonville, supra., that:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker." At 2314.

This Court in the Hortonville case went on to cite an earlier case decided by it which states:

> "Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was 'involved' in the events preceeding this decision, in light of the important interests in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power." At 2316.

The Petitioner has not carried his burden of persuasion in this case. The Petitioner has shown nothing except that the Board was carrying on its statutory duties. There is nothing to indicate that Respondents were not being as fair and honest as possible, and that Petitioner was repeatedly given every opportunity for a meaningful hearing and he refused to participate.

CONCLUSION

The Idaho Supreme Court has carefully and consistently followed the cases decided by this Honorable Court both in their spirit and in their letter of the law. Petitioner was given notice of the charges against him as well as his rights under the Constitution. He was given an opportunity for a meaningful hearing, which opportunity he voluntarily, knowingly, and willfully waived. Petitioner

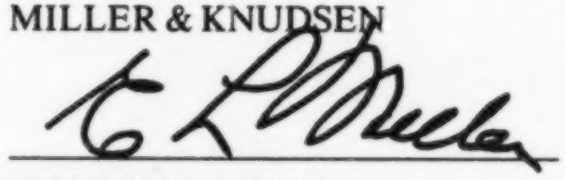
was not discharged until after he had his opportunity for hearing and waived it. The Respondents repeatedly showed to the Petitioner that they wanted to hear his side of the story and Petitioner refused them that opportunity by leaving the meeting.

For these reasons this Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

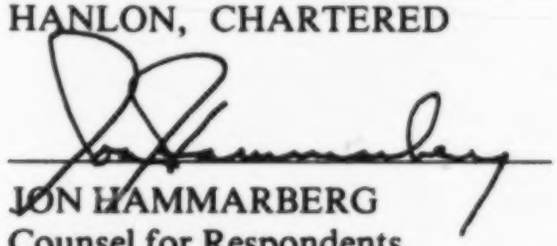
COOKE & LAMANNA
ATTORNEYS AT LAW
PRIEST RIVER, IDAHO 83856

MILLER & KNUDSEN



EUGENE MILLER
Counsel for Respondents
Coeur d'Alene Professional Center
P. O. Box E
Coeur d'Alene, Idaho 83814
Tel. (208) 664-8115

HERNDON, HAMMARBERG &
HANLON, CHARTERED



JON HAMMARBERG
Counsel for Respondents
P. O. Box 216
Sandpoint, Idaho 83864
Tel. (208) 263-6828

GREENE & HUNT
James E. Hunt
Counsel for Petitioner
320 N. Second
Sandpoint, Idaho 83864

WILSON & WALTER
Peter B. Wilson
Counsel for Petitioner
Box 749
Bonners Ferry, Idaho 83805

September 26, 1977

APPENDIX A

TRANSCRIPT OF HEARING
BEFORE THE BOARD OF TRUSTEES OF
BONNER COUNTY SCHOOL DISTRICT NO. 82

BONNER COUNTY SCHOOL DISTRICT NO. 82

Trustee Meeting No. 522
Administration Office
Sandpoint, Idaho
June 26, 1973

HEARING - JACOB FERGUSON

Present at the Hearing: Mr. Jacob Ferguson, Trustees Beeson, Ebbett, Morton, Ruen and Verhei. Also present were Superintendent Likens, Assistant Superintendent Lamanna, Clerk-Treasurer Hagadone, Attorney Featherston, W. L. Overholser, William Miller, Harold Walker, Roy and Randy Self, Mr. and Mrs. K. L. Mott and Deana, Russell Keane, and Bill Denman.

Mr. Ruen: All of us are here that need to be here at this point. You have been notified and have asked for the hearing tonight.

Mr. Ferguson: That is correct.

Mr. Ruen: I think at this point I will ask Mr. Featherston to open it.

Dr. Likens: One thing, Mr. Chairman, we ought to clarify what we are going to do in terms of this meeting . . .

Mr. Ruen: How we are going to cooperate that one . . .

Dr. Likens: Yes.

Mr. Ruen: Do you want Mr. Featherston to explain that one or do you want me to explain?

Dr. Likens: Yes.

Mr. Ruen: Do you want to explain, Mr. Featherston.

Mr. Featherston: Basically, all I have discussed with the Board is a procedural point and it is my feeling in that

the vote as given to Mr. Ferguson only sets forth an accusation, not a final determination by the Board. It would be necessary for the Board or for the District to present testimony one way or the other and for Mr. Ferguson to have the opportunity to cross examine or question anybody that is presented and Wayne — Mr. Hagadone — could you swear witnesses that will be called to testify?

Mr. Hagadone: Yes.

Mr. Featherston: I just briefly discussed with Mr. Ferguson, just before the meeting, this procedural point, it is a feeling, as I understand it, that you just wanted to question some people.

Mr. Ferguson: Yes.

Mr. Featherston: You didn't want to present anybody independently. . .

Mr. Ferguson: No.

Mr. Featherston: This may have some bearing on the procedure you want to follow if you want to vary your procedure due to this, it will be fine. Is it strictly members of the Administration or Board?

Mr. Ferguson: School Board members.

Mr. Featherston: Just School Board members?

Mr. Ferguson: Yes.

Dr. Morton: Mr. Chairman, if I may, I would prefer to have the district's witnesses called one by one and to have all witnesses excluded except during the time of testimony.

Mr. Verhei: Do you want to make that a motion?

Dr. Morton: I would move that we call the witnesses individually and have them in the room only during the time of testimony, subject to recall.

Mr. Ferguson: If I might interject, I really don't care to hear any testimony and I don't care to question anybody except the Board Members. You can hear all the witnesses that you like — I just came here this evening to question you as a matter of fact, because you were the Chairman of the Board when the action was started.

Dr. Morton: This is correct.

Mr. Ferguson: And I only have one question . . .

Dr. Morton: I don't particularly care, I think that if we are going to have testimony given this evening, it's in the interest of justice — it's not right for one witness to hear what another witness says.

Mr. Ruen: So that you're saying now . . . anybody here of these names who are listed, or anybody else that's bearing evidence be outside of the room until our Attorney asks them to come in.

Dr. Morton: Right, this is what I am saying.

Mr. Featherston: Or Mr. Ferguson . . .

Dr. Morton: Yes, or Mr. Ferguson.

Mr. Featherston: The only other variation I would request on that would be that the members of the administration or Board who either Mr. Ferguson or myself would want to inquire of, be allowed to remain during the duration of the hearing. I think that the nature of any testimony from the members of the administration would be substantially different than anything from the lay witnesses and parents and students, would be a distinct classification — if this is all right with you.

Mr. Ruen: Did I understand you correctly in that you said you didn't care about hearing anything?

Mr. Ferguson: That's correct.

Mr. Ruen: That you came here to ask one question . . .

Mr. Ferguson: Yes.

Mr. Ruen: . . . is it your feeling that you'd like to at some stage of this thing — as I understand you —

Mr. Ferguson: Yes . . . Maybe if I made a statement it would . . . I might clarify what I am thinking. The letter indicates a certain amount of evidence has been received by the Board. I assume that they have received all of the evidence, whatever it is to date — that they have made their decision to dismiss me based on this evidence, is this not true?

Mr. Featherston: If I might make a point of clarification for Mr. Ferguson at this point . . . unfortunately the way the law requires that these procedures be set out — is that the Board make a cursory or a finding that there is some substance or some reason why a hearing should be held. A hearing held and further action as to a teachers contract — and at that point, based on that, they make and pass a Resolution and send out a notice to the teacher advising him of this and this does not mean that the action taken at that point is final, assuming that there was no hearing held whatsoever, the Board would still have been required to take additional action in order to terminate a contract. So at this point, the contract would not be terminated.

Mr. Ferguson: What you are saying is they have not heard all the evidence as of this time.

Mr. Featherston: This is correct . . . it is very similar to in law, you have criminal and civil law, where you have an individual sign a complaint or whatever and in this case, the school district, the Board, is the only one authorized to send out this notice. The Administration, School District, Attorney, parents, are not authorized to send out this notice to a teacher.

Mr. Ferguson: If I had not requested this hearing then there would be no hearing, is that correct?

Mr. Featherston: There would still have to be some type — some type of a . . .

Mr. Ferguson: Well yes, at a regular Board Meeting they would decide to continue along with the process that they had started.

Mr. Featherston: This would be a default procedure, yes, there would be nothing shown to the contrary . . .

Mr. Ferguson: That is why I had assumed that the Board had received all the evidence.

Mr. Featherston: No . . . I think you were advised in the notice that you had the right to legal counsel also.

Mr. Ferguson: Oh — yes.

Dr. Morton: Why don't we read the resolution again verbatim so that we know what we are talking about here. It has been sometime since some of us have read it.

Dr. Likens: May 15, 1973 — RESOLUTION FOR DISCHARGE OF TEACHER — It is Resolved By: The Board of Trustees of Bonner County School District No. 82, of Bonner County, Idaho, being fully advised in the premises, and being of the opinion that Jake Ferguson, a teacher in said District, should be discharged for the following reasons:

Applying a grading system for an improper purpose and which does not relate to the level of difficulty of work to such an extent as to constitute gross neglect of duty in failing to report progress of students to parents accurately, and that said acts constitute insubordination in that the teacher has previously been instructed to correct this deficiency and neglected to do so.

A hearing may be requested by Jake Ferguson within 30 days after receipt of a copy of this resolution for the purpose of showing cause why said discharge should not be effected.

Said hearing must be held within 15 days after the request is received. At said hearing, the teacher may be represented by counsel and may present evidence on his own behalf and examine any person who may have spoken against him.

It was moved, seconded and carried that the above resolution be adopted . . .

Mr. Ferguson: That sounds pretty conclusive to me — like I say, from that, I assumed that the Board had heard all the evidence.

Mr. Ruen: Well, actually, that is the reason for the hearing. It says, the Board, in essence, is of the opinion that what they know at that point is legal to believe, shall we say, that a teacher should be discharged — then the hearing is for you, if you ask for a hearing, to justify your grading systems, to do whatever you choose — because if you ask for a hearing, the assumption is that you don't agree with the reason up to that point and this is to let you present your reasons for . . .

Mr. Ferguson: That's right, and I have, as I said, just one question that I wish to ask and as far as I am concerned that's all I am here for. If you would like to hear more evidence — I don't understand how a Board can take action on only part of the evidence — but that is your business, not mine.

Mr. Ruen: No action has been taken.

Dr. Likens: It is initiated though.

Mr. Ruen: Yes, we have, this is right — it is initiated — but some of these things are governed by state law

and we have to do things in a certain way. Whether we like it or whether you like it. This resolution is something that is required by law to be done in a certain way and to word it exactly to say what we are trying to say is a difficult thing in itself because even that is . . .

Mr. Ferguson: Well counselor, since you are the legal mind — how do we proceed?

Mr. Featherston: Have you talked to an attorney?

Mr. Ferguson: No, I haven't.

Mr. Featherston: Your attorney could have explained this procedure to you if you had stopped in and made an office call and we can either — if you feel you would be jeopardized by proceeding without counsel or proceeding further in this hearing at this point, you could make a request to the Board for a continuance on this hearing for a certain length of time. The Board could consider your reasons, whatever — or we can proceed — I am prepared to proceed at this point to present testimony.

Mr. Ferguson: I mentioned to you outside that I had requested the hearing and I mentioned to these gentlemen that I really don't care to hear any testimony and I care not to question anyone. So if it is all right with you, I will go ahead with my question and then you can go ahead with your hearing — or with my hearing.

Mr. Featherston: I would agree with this variation in this procedure . . . it wouldn't make any difference to me.

Dr. Morton: I wonder if, in the interest of justice all the way around, it wouldn't be wise to again remind Mr. Ferguson that he can have the opportunity to retain counsel.

Mr. Ferguson: Can I ask you a question, Dr. Morton?

Dr. Morton: Surely.

Mr. Ferguson: In the interest of justice, you have a procedure, I believe, that suggests that if there is some difficulty — that it go through the administrative steps — Principal, Superintendent and Board, isn't that correct, is there such a procedure in your manual?

Dr. Morton: This is true.

Mr. Ferguson: Before you published my proposed dismissal in the paper, why wasn't that procedure followed?

Dr. Morton: I think that as far as the Board is concerned, in concept, that procedure was followed.

Mr. Ferguson: Oh, I see.

Dr. Morton: So this is one of the reasons that if you don't think it was — this gets right back to my suggestion of about two minutes ago — if you feel that you are not being fairly taken care of in this respect, it would be my urgent suggestion that you retain counsel . . . because this Board, believe me, Mr. Ferguson, and I am sure I can speak for all of us — has no intention of railroading anyone. I think that you should know that we want you to have just as fair a shake as you can have.

Mr. Ferguson: Well then, why wasn't that procedure followed?

Dr. Morton: As far as the Board is concerned, it was followed and it would have to be proven differently before the Board would know any differently.

Mr. Ferguson: Maybe I misread the manual but I understood that the process was that if a Principal and a Teacher could not resolve their differences they were to go to the Superintendent — if the Superintendent and the Teacher could not resolve the differences, then they were to go to the Board.

Dr. Morton: It is the Board's understanding this procedure was followed and if it is your understanding it wasn't followed, then it is up to you to prove it wasn't.

Mr. Ferguson: I think that is quite clear because I requested this hearing . . .

Dr. Morton: It is not clear to me — without some proof, I am only speaking for myself now.

Mr. Ruen: Would you explain that a little bit . . . it is not quite clear to me what you mean.

Mr. Ferguson: There is a grievance procedure adopted by the School Board of this District and I am just going from my cursory understanding — that if a Principal and a Teacher cannot reconcile a difference, regardless of what it is, then they are supposed to go to the Superintendent. If their differences cannot be reconciled at that level, then the whole matter goes to the School Board . . . and then if it can't be reconciled at that level, where it would go, I don't know. But, in this case, the last time I talked with Dr. Likens, was in September, last year. Since then, I have talked with the Administrator at the Junior High School whenever a problem arose. O.K., I was told by that Administrator on Monday — when we had a difference of opinion — I am going to take this to the Superintendent. On Wednesday, the Superintendent was in the Junior High School office with Mr. Lamanna and the two Administrators at the Junior High School and he read this letter to me. Now, I don't believe that that's following the procedure.

Dr. Morton: It may be well to get out the policy manual and just review it . . .

(At this time Mr. Ferguson excused himself for approximately 3 minutes to obtain a drink of water.)

Dr. Likens: I'll wait until Mr. Ferguson gets back. Continuing . . .

In terms of grievance, in terms of teacher evaluation and teacher disciplinary action, a different procedure is followed.

Dr. Morton: A grievance, by my definition has to do with working conditions, salaries . . .

Mr. Verhei: Well, of course, on a broader term, this would be a grievance too.

Dr. Likens: A grievance is basically after an administrative recommendation or decision has been made.

Mr. Verhei: Yes, but then does the policy state that the teacher and the principal is supposed to contact the administrator?

Dr. Likens: Either one, the teacher or administrator can contact me, the Superintendent, to try and set down with the two of them to resolve a grievance. In terms of an evaluation and making recommendations for continued employment, et cetera, it is the principal's responsibility, when you start getting into a termination case, to make a recommendation to this office. This was done. The difference between this and a year ago — there was no recommendation for termination — there was a recommendation for reassignment. The principal in this case, after working with the teacher — and we can produce letters to the teacher from the principal spelling out the difficulties — Mr. Overholser, said to the teacher and then to this office, we can't go any more this way, in essence, it is my recommendation that additional action be taken.

At that particular point that came to me, I elected to take it directly to the Board to get to the place that we could get down to the basic facts of whether

this Teacher's performance merited continued employment. The grievance — my decision to take that to the Board, is what this is.

Dr. Morton: This hearing now.

Dr. Likens: Right.

Mr. Verhei: Is that what it states there?

Dr. Likens: We do not have any specific statement except as it applies to the general citizens — this is one area that our manual should be strengthened. (Dr. Likens read the specific spelled out for procedures from the manual). "Any citizens or group of citizens" and this is the only place we have any specific spelled out procedures — it is a basic operating procedure — but it is not spelled out in Board policy, "desiring to bring items of business before the Board shall submit their requests in writing at least three days before regular Board meetings. Such requests shall be submitted to the Superintendent of Schools. If the matter cannot be resolved by direct action of the Superintendent, the Board of Trustees, through the Superintendent, shall schedule the citizens or group of citizens to be present at the next regular meeting convenient for their appearance."

Mr. Verhei: There is nothing there with regard to the employee then?

Dr. Likens: There is no specified procedure. Operationally we say that if there is a grievance between a staff member, in fact, I've been working on policy on this as a result of the custodian affair — that it should be resolved with the immediate supervisor, then the immediate supervisor makes a decision, the employee has a right to appeal it to this office and then eventually to the Board. The policy spells out the process of who makes the evaluations and the recom-

mendations come from the building principal to this office.

I think within this group, show where I've said I don't think you have a reason for me to take it beyond this point even with the principals here although I'd not intended to go that route.

Dr. Morton: In other words what you are saying — the policy manual does not spell out step by step procedures to be followed in cases of this specific nature.

Dr. Likens: In grievance — normally — in terms of a normal procedure. We have asked the teachers association here to get involved in development of a grievance procedure. Normally deals only with a negotiated agreement between the Board and the Teachers Association. In other words, these are the things we agree to — in ours it spells out — the only things that teachers, under a formal grievance procedure — although they have not adopted one, would be a grievance procedure itself — salary, salary related fringe benefits, and hours.

Mr. Featherston: This type of matter, in my opinion, is covered by statutory and case law and general due process of procedures and this is what we are attempting to do at this time is to follow due process — there has been a dispute — I wouldn't even class it as a dispute — there has been a complaint by a teacher on the professional level of a professional nature and it comes to the matter of due process — the Administration has made the recommendation of termination and the next step is the hearing which Mr. Ferguson has requested.

Mr. Ferguson: But if I hadn't of requested it, your process would be to just go ahead with the dismissal, right?

Mr. Featherston: Yes, but default hearing — just like any lawsuit, Mr. Ferguson.

Dr. Morton: Am I correct in assuming that our procedure here now is in accordance with Idaho Code — rather than with any type of school policy, is that correct?

Mr. Featherston: Idaho Code and recommendations of the Attorney General's office and the State Board of Education as defined by the Attorney General's office and the Idaho Supreme Court due process requirements.

Dr. Morton: Then we are acting within the proper legal authority.

Mr. Featherston: This is correct.

Mr. Verhei: Then my understanding has been, of course I must of had the wrong understanding, that what Mr. Ferguson said was correct as far as what my understanding concerned was — that if a teacher and principal cannot settle differences they take it to the Administration and if they can't settle it they take it to the Board — has this been your understanding, Vern?

Mr. Ruen: Well, with citizens, we've never been in this thing before . . . this is our first time for this.

Mr. Featherston: I might point out this is the same or similar procedure used that we followed through with a teacher that was represented by counsel last year — we had a case where the teacher was represented by counsel, and in that case the teacher was not terminated and we did follow this procedure and counsel never at any time raised any issue over due process. Strictly a factual matter we resolved at that time.

Dr. Morton: I am satisfied, Mr. Chairman, that we are moving in the proper legal circumference — this is what concerned me.

Mr. Ferguson: What have you decided to do?

Dr. Morton: We don't know yet.

Mr. Ruen: That is why we are here — for you to help us decide if you have reason to believe that we don't have all the facts as you see them.

Mr. Featherston: You desire to present anything first?

Mr. Ferguson: I just have one question to ask of Dr. Morton.

Mr. Featherston: Do you want to ask that now — before we proceed?

Mr. Ferguson: I might as well.

Mr. Featherston: Why don't you do that.

Mr. Ferguson: Dr. Likens read the letter that you sent me and it states in there reasons why the Board is recommending my dismissal and you are, I am sure, are aware of the facts in the letter.

Dr. Morton: This is correct — keep in mind, Mr. Ferguson, the Chairman signs this after action by the Board.

Mr. Ferguson: Well, because you signed it and were Chairman of the Board at that time is why I am addressing you. The thing I would like to determine is that on the evidence that the Board was presented — which resulted in this letter, do you feel that this evidence is all true and sufficient for my dismissal?

Dr. Morton: Well, if you are asking me to speak for the Board, I can't do that — I can speak for myself and I think you would have to inquire of each Board

member to get their individual reactions to your question. There is a question in my mind whether it is all true and that's why a hearing was suggested or was indicated.

Mr. Ferguson: Dr. Morton, if I hadn't requested this hearing you wouldn't of had it and you would have gone ahead with my dismissal.

Dr. Morton: Then my assumption would have been that if you had not requested a hearing that the allegations were correct. How else could I assume?

Mr. Ferguson: Fine.

Dr. Morton: But because I was not sure in my mind and because I am certain the other Board Members probably feel this way, you were granted, according to law, the opportunity to have a hearing.

Mr. Ferguson: But, Dr. Morton, if you weren't sure in your mind — why didn't you call the hearing . . .

Dr. Morton: Well essentially this is what we did.

Mr. Ferguson: No you didn't, I called the hearing.

Dr. Morton: Well I think it is a moot point really.

Mr. Ferguson: Well I think it is very important because you publicized in the paper that I was dismissed by unanimous vote.

Dr. Morton: Well I don't know whether that was the case or not now — I would have to see a newspaper article. Newspaper reporters are present and honestly I cannot remember what the newspaper article was — maybe you are right, I don't know.

Dr. Likens: In fact I have watched very carefully and I never did see a statement on this particular case.

Mr. Verhei: I saw the statement — his statement is correct.

Dr. Morton: This could be — I'm sorry to say that many times what reporters have to say about school board meetings or city council meetings or county commissioner meetings sometimes are not too accurate — maybe in this case they were accurate — I would like to know what the article actually said because I don't recall having seen it myself.

Mr. Ferguson: It was a sentence hidden in the last paragraph of the minutes of the Board meeting — of the write-up of the Board meeting — just one sentence that stated that the Board had unanimously voted to dismiss Mr. Ferguson.

Dr. Morton: This is one reporter's interpretation, you see.

Mr. Verhei: I think that was right — I think that it was unanimous . . .

Dr. Morton: We have not unanimously decided to dismiss him but have unanimously decided to send the resolution to him.

Mr. Verhei: That's right — it was a unanimous decision of the Board that was the action taken.

Dr. Morton: Yes, to send the resolution, right. But certainly is not tantamount to dismissal.

Mr. Ferguson: But the question I am asking you is that at that point did you feel that the evidence that you had been presented was true and was sufficient for my dismissal?

Dr. Morton: My answer to that is, yes sir, I did, and I am glad you came here tonight because maybe you will do something to change my mind.

Mr. Ferguson: Well, I am not going to do anything to change your mind, because I think you have already made up your mind.

Dr. Morton: Then you don't know me very well, Mr. Ferguson, and I'm sure you don't know the other Board members very well either.

Mr. Ferguson: Then if there is any doubt in your mind — you had better call another meeting after this one and get all the facts.

Dr. Morton: I think I suggested, twenty minutes ago, didn't I, Mr. Chairman, that we continue this so Mr. Ferguson could obtain counsel and could continue this hearing further.

Mr. Ruen: Yes, he can obtain anybody he chooses and present any statements — this is right, you did. I can see no reason why the Board would not go along with this — this is an opportunity for you to show us where you were right and we possibly either did not understand the situation or mis-informed or whatever.

Mr. Ferguson: This is what I just cannot understand — it just doesn't make sense to me — that you people including the Superintendent, would, after the Administration at the Junior High School and I had supposedly reached an impasse, would not continue your procedure — which is normally as I say, have the Superintendent review all the information with persons involved and if the agreement cannot be reached then the Board listen to all of the arguments — both sides — before you make any decision like this one and which you publicized in the paper.

Mr. Featherston: Mr. Ferguson, is this a formal notice published in the paper that you are referring to — or is this an editorial or a recorded part of the paper — is this in the legal notices?

Mr. Ferguson: As far as I am concerned I could care less where it is — it was in the paper and it did me personal damage.

Mr. Featherston: Was this in the legal notices?

Mr. Ferguson: No, it was not — it was a write-up of the Board meeting and what had transpired at the Board meeting.

Mr. Featherston: Presumably by the reporter or the editor of the paper, is this correct?

Mr. Ferguson: Yes.

Mr. Featherston: O.K., then it's your contention that the Board paid the editor or the reporter to put this notice in, in this form?

Mr. Ferguson: I have no idea what the arrangements were — I don't know how the newspapers get the Board minutes, whether they go listen to the Board or whether the Board sends copies of the minutes.

Mr. Featherston: It's not your contention that this is a paid advertisement or a paid legal notice in the paper that advised the public that you were terminated — it's just general reporting by the newspapers . . .

Mr. Ferguson: Information that the paper must have received by some action, I have no idea how.

Mr. Featherston: I think that clarifies that point because . . .

Mr. Verhei: The Board had nothing to do with that.

Mr. Featherston: Right — I know from my own personal experience that things can come out said in a different way.

Mr. Verhei: I don't think the Board ever had any intentions of publicizing that.

Dr. Morton: If a reporter is sitting here tonight he is free to report whatever he feels happens at this Board meeting.

Dr. Likens: By Board agreement, the newspapers may come in, and as soon as Wayne has the minutes typed, the unofficial minutes, they may read them.

Dr. Morton: This is right.

Mr. Featherston: These are matters of public interest and the public is entitled to know about it and of course the newspaper itself would be liable, not the Board. If the newspaper erroneously, falsely and maliciously published something and injured someone and then of course . . .

Mr. Ferguson: This is in direct contrast to the way that the Board conducted itself at the previous hearing which concerned my transfer — they went into executive session so that I assume that their reasons were that whatever was discussed would not be public . . . you see and in this case they discussed it apparently in a public meeting and as I say the information got into the paper and I feel that considerable personal damage was done by that notice.

Mr. Ruen: The action that lead up to the resolution, over the objection of several Board Members — one or two anyway, was held in executive session. We were required, as we were in the previous hearing, to come out and state a position and this was that this resolution as it's worded here would be such giving you an opportunity to correct us if we were wrong in our thinking at that point and which we did before — we came out of executive session and the final results were announced and voted on in public and the same thing was done in this case — you were not berated or discussed in public. We went into executive session and said it looks like that we have a problem that needs to be resolved and the law says certain things — the way to spell it out and give you an opportunity — and say

how many days you have according to law and the whole works to come and show us where we were wrong — we took this action — we came back out and voted on it in public and that was the action taken — sometimes, reporters report things that I don't like too . . . because they don't sometimes probably hear it all they don't understand it all, but this thing in the paper was not . . . it was an attempt, I suppose by, this is the Bee, I think . . .

No, it was in the other paper.

Mr. Ferguson: It was in both of those.

Mr. Ruen: Oh, was it? Well then they probably . . .

Dr. Likens: That particular night, there was neither paper represented.

Dr. Morton: It just went in the minutes then?

Dr. Likens: That's right . . . the minutes are clear — you can get them out and read them.

Dr. Morton: All the minutes are back from the year one for the public to read.

Mr. Featherston: Would you like additional time, Mr. Ferguson, would you like to consult with legal counsel?

Mr. Ferguson: No.

Mr. Featherston: I would be happy to stipulate to continue — in fact, I would prefer that you were represented by legal counsel — it would make it easier to conduct the hearing.

Dr. Morton: I would prefer it too.

Mr. Ruen: I would too — this is his choice, the law doesn't say he has to be and it doesn't even say he has to ask for a hearing.

Mr. Ferguson: Right.

Mr. Featherston: I would like to proceed then if — are you through with the questioning.

Mr. Ferguson: I'm through . . . thank you very much.

(Mr. Ferguson left the hearing at this time — 9:40 P.M.)

Dr. Morton: Mr. Chairman, hearing no evidence to the contrary, I move that the recommendation of the Administration be followed with respect to the dismissal of Mr. Ferguson as a teacher in this county and school district.

Seconded by Dr. Beeson, the motion carried. Trustees Beeson, Ebbett, Morton, Ruen and Verhei voting "yes."

Mr. Ruen: Now under discussion — where do we go from here at this . . .

Mr. Featherston: I think this would be a legally sound position, Mr. Chairman, because again I daresay I could analagize it to a civil law suit where a person defaults which in essence Mr. Ferguson has voluntarily elected to default in our presence, the Board's presence — you can file an affadavit or go on the basis of the allegation of your complaint. I think there has been sufficient evidence presented showing that the . . .

Mr. Ruen: Do you think that we should go ahead and hear . . .

Mr. Featherston: I think it wouldn't hurt to really possibly present Mr. Overholser and Dr. Likens — brief statement from each of them. As far as everyone else is concerned, I think we could safely dismiss everyone else at this point.

Mr. Verhei: As far as I'm concerned, the thing's over right now.

Dr. Morton: I don't like testimony of any kind when the person being talked about is not around here.

Mr. Verhei: I don't either.

Mr. Ruen: As far as I'm concerned, of course, go ahead.

Dr. Morton: I'd rather not hear any testimony without Mr. Ferguson being here.

Mr. Verhei: As far as I'm concerned, he's left the meeting and he has substantiated no reason why we should retain him — there's no use going any further. We've gone as far as we can go.

Dr. Morton: There were enough allegations — we've sent our resolution in — I think that's sufficient.

Mr. Verhei: I think so too.

Mr. Featherston: Dr. Likens, in reference to the notices, would you inform the Board as to the time period that was involved on the notice — in his request for a hearing.

Dr. Likens: The notice was served on the 16th of May and was served in person as Mr. Ferguson so stated . . . Mr. Lamanna, I asked Mr. Lamanna to go as my witness — I did not know whether Mr. Overholser or Mr. Miller would be available, in fact, I said to Wib, it's not necessary that Mr. Miller be there — if you're available fine and they were both there, served the notice, and we received notice in return two days before the deadline . . .

Mr. Featherston: We did receive the notice within the deadline period?

Dr. Likens: Within the deadline, yes.

Mr. Featherston: That's all I wanted to verify.

Mr. Ruen: It was a written request.

Dr. Likens: With signed receipt, return receipt requested.

Dr. Morton: It was sent to me because he thought I was still chairman — I signed for it and I answered it as Chairman Pro-Tem because you were out of town . . .

Mr. Ruen: That was what I was asking — it was a certified letter then . . .

Dr. Morton: Right.

Mr. Ruen: Then . . .

Dr. Morton: I think the Board was all sent copies of that letter.

Mr. Ruen: I think so too — we've had so much . . .

Dr. Morton: I asked them to do that . . .

Dr. Likens: The only letter, and I was going to present that tonight, the Board has not received was the copy of the letter that I sent to Mr. Ferguson in response to his request to know who was going to testify against him . . .

Dr. Morton: He had requested in a letter that I had receipted that he be furnished a list — I said he would be furnished a list by a certain date by the Administration.

Mr. Ruen: I have a copy.

Dr. Likens: On June 21st, which was the date that Dr. Morton had spelled out that we would provide it on or before June 21st, we sent the letter. I only have four copies — in which I stated "The Board of Trustees, Bonner County School District No. 82, will select witnesses at the hearing scheduled for 9:00 p.m. on June 26, 1973 in the Administrative offices from the following:" then I identified the "following."

In this particular situation, I did not go to Wib to

contact other parents who had filed complaints — I checked the parents who had expressed concern in writing or had talked to me directly. For the benefit of the Board, Randy Self, and his father, Roy, are here. Mr. and Mrs. Kenneth Mott and Deana, are also present . . .

Mr. Ruen: We understand . . .

Mr. Verhei: I've had some phone calls on this thing too, Vernon.

Dr. Likens: I've had other people come after I sent this letter and say "can we testify" — I said no because I had not so notified them . . .

Mr. Ruen: Are you ready for the question?

Mr. Hagadone read the motion . . . Seconded by Dr. Beeson, the motion carried. All voting "yes."

In the Supreme Court of the United States

October Term, 1977

No. _____

Jacob C. Ferguson, Petitioner

v.

The Board of Trustees of Bonner County School District No. 82, A Municipal Corporation of the State of Idaho, and Vernon Ruen, Dr. William H. Morton, Jr., Venus Verhei, Marian Ebbett, and Dr. David Beeson, constituting the members of said Board, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION to Petition for a Writ of Certiorari to the Supreme Court of Idaho

COUNTER STATEMENT

Respondents cannot agree with parts of Petitioner's Statement. While the facts themselves are not in dispute the conclusions drawn from said facts vary substantially. For this reason, Respondents have set out in its entirety, the Transcript of the hearing before the Board of Trustees of Bonner County School District No. 82. (Appendix A) It is Respondents' position that, based on the entire transcript of the hearing, it can be seen that Petitioner was advised several times of the duty of the Board to present evidence in order to allow Petitioner to cross-examine witnesses. (Appendix A, pp 11-12 and 16) The Respondents further advised the Petitioner of his right to counsel and his right to present evidence in his own behalf. (Appendix A, pp 15-16, 17, 18, 27 and 30) The Board

went even further and suggested that, if the Petitioner desired, a continuance would be granted in order that he could better prepare himself for the hearing. (Appendix A, pp 17, 27 and 30) After being advised concerning his rights, Petitioner willfully declined the opportunities given him to exercise his rights. (Appendix A, pp 17 and 30)

Petitioner's statement that "At least one of respondents agreed that petitioner had correctly interpreted the newspaper's conclusion" is not based on the transcript. The statement which Petitioner refers to is found on page 25 of Appendix A. The respondent referred to was simply agreeing that there was a statement to that effect in the newspaper, not that the Board had dismissed Petitioner. (Appendix A, pp 25-26) In fact, at the beginning of the hearing Petitioner was advised that he was not dismissed from his position as of that point in time. (Appendix A, pp 14, 15 and 26) The notice originally sent to Petitioner speaks in terms of "should" rather than "is" or "has," (Appendix A, pp 15-16) and advises Petitioner of his rights.

Petitioner further attempts to show bias by stating that ". . . one respondent . . . had actually made up his mind . . ." This same respondent indicated on several other occasions, along with other Board Members, that he wanted to be as fair as possible and hear Petitioner's side. (Appendix A, pp 18, 24-25 and 27)

Finally Petitioner's statement that he ". . . was without any record to present to an appellate court; and for him to have stayed at the hearing would have been a futile act since the board had a preconceived conclusion." is not borne out by the record. Whether or not he concluded that any hearing would be fruitless in fending off his dismissal, whether or not he had concluded that no defense could sway the Board he saw as already convinced that he should be dismissed, he knew his right to be